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Barristers-at-Law

1950—Vol. I.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 6 STONE BUILDINGS
LINCOLN'S INN, LONDON, W.C.2,
AND
PRINTED BY GEO. BARBER & SON LTD., 23 FURNIVAL STREET,
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In the First Series,
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In the Third Series,
[1950] A. C.

TABLE OF CASES REPORTED
IN THIS VOLUME

A. PAGE

Abergele U.D.C., Pilling *v.* – 636
Alexander, Old Gate Estates, Ld. *v.* – – – – 311
Allen, Mitchell *v.* – – – 448
Atkinson, Pacey *v.* – – – 539
Attorney-General *v.* London Stadiums, Ld. – – 72, 387
Auerbach, Edler *v.* – – – 359

B.

Bacon *v.* Grimsby Corporation – 272
Baldock, Middleton *v.* – – 657
Barnes, Mitchell *v.* – – – 448
Baxter *v.* Eckersley – – 480
Becollda Property Investments, Ld., Colton *v.* – – – 216
Besser Manufacturing Co., International Corporation, Ld. *v.* 488
Blackmill, Ld. *v.* Straker – 346
Board of Trade, Stage Line, Ld. *v.* – – – – – – 536
Boguslawski *v.* Gdynia-Ameryka Linie – – – – – 157
Bolton, Stone v. – – – 201
Bolton Leathers, Ld., Hales *v.* – 493
Border Rural District Council *v.* Roberts – – – – 716
Braddock *v.* Tillotson's Newspapers, Ld. – – – 47
Burgess, Fred Long & Son, Ld. *v.* – – – – – – 115
Butcher, Solle *v.* – – – 671
Butler, R. B. Policies at Lloyd's *v.* – – – – – 77

C. PAGE

Cardiff Corporation, Williams *v.* 514
Charles Rickards, Ld. *v.* Oppenheim – – – – – 616
Chessington Zoo, Ld., Surrey County Valuation Committee *v.* – – – – – 640
Clarke *v.* Grant – – – 104
Clarke, Rex *v.* – – – 523
Cole (Ernest J.) & Partners, Ld., Ex parte. Rex *v.* Somerset, J. J. – – – – – 519
Colton *v.* Becollda Property Investments, Ld. – – 216
Copps *v.* Payne – – – 611
Coughtrey *v.* Porter – – 629
Cunliffe *v.* Goodman – – 267

D.

Dabson, Manley *v.* – – 100
Dearnley, Law *v.* – – – 400
Dickson, Rex *v.* – – – 394

E.

East Norfolk Rivers Catchment Board, Marriage *v.* – – 284
Eckersley, Baxter *v.* – – 480
Edler *v.* Auerbach – – – 359
Ernest J. Cole & Partners, Ld., Ex parte. Rex *v.* Somerset J. J. – – – – 519

F. PAGE

Fred Long & Son, Ld. *v.* Burgess – – – – 115

G.

Gaisberg *v.* Storr – – – 107
Gdynia-Ameryka Linie, Boguslawski *v.* – – – – 157
Goldsack *v.* Shore – – – 708
Goodman, Cunliffe *v.* – – 267
Grant, Clarke *v.* – – – 104
Grimsby Corporation, Bacon *v.* 272

H.

Hales *v.* Bolton Leathers, Ld. – 493
Hannaford, Tamlin *v.* – – 18
Harris, Morris Motors and, Smith *v.* – – – – 194
Harrison *v.* Hopkins – – 124
Harrison *v.* National Coal Board 466
Hine, Irvin *v.* – – – 555
Holt, Littlechild *v.* – – – 1
Home Secretary, Lyons (J.) & Co., Ld. *v.* – – – – 531
Hopkins, Harrison *v.* – – 124
Horton *v.* London Graving Dock Co., Ld. – – – – 421
Hutchinson *v.* Jauncey – 574
Hutchinson, Woodside House (Wimbledon), Ld. *v.* – – 182
Hutton and J. Cook & Sons, Ld., James v. – – – 9
Hyland, Ld., James Lamont & Co., Ld. *v.* – – – – 585

I.

International Corporation, Ld. *v.* Besser Manufacturing Co. – 488
Irvin *v.* Hine – – – – 555

J.

James *v.* Hutton and J. Cook & Sons, Ld. – – – – 9
James Lamont & Co., Ld. *v.* Hyland, Ld. – – – 585
Jauncey, Hutchinson *v.* – – 574
Johnson *v.* Youden – – 544

K. PAGE

Keeble *v.* Miller – – – 601
Kestell *v.* Langmaid – – 233
King, The, *v.* St. Pancras Borough Assessment Committee. Ex parte The Railway Executive – – – – 58
Kritz, Rex *v.* – – – 82

L.

Lamont (James) & Co., Ld. *v.* Hyland, Ld. – – – 585
Langmaid, Kestell *v.* – – 233
Law *v.* Dearnley – – – 400
Lederer *v.* Parker – – – 90
Lewis *v.* Thomas – – – 438
Lineham, Lucas *v.* – – – 548
Littlechild *v.* Holt – – – 1
London Graving Dock Co., Ld., Horton *v.* – – – – 421
London Stadiums, Ld., Attorney General *v.* – – – 72, 387
Long (Fred.) & Son, Ld. *v.* Burgess – – – – 115
Lucas *v.* Lineham – – – 548
Lyons (J.) & Co., Ld. *v.* Home Secretary – – – – 531

M.

Manley *v.* Dabson – – – 100
Marriage *v.* East Norfolk Rivers Catchment Board – – 284
Martin, Moat *v.* – – – 175
Matthews, Minister of Agriculture and Fisheries *v.* – – 148
Middleton *v.* Baldock – – 657
Miller, Keeble *v.* – – – 601
Minister of Agriculture and Fisheries *v.* Matthews – – 148
Minns *v.* Moore – – – 241
Mitchell *v.* Barnes. Same *v.* Allen – – – – 448
Moat *v.* Martin – – – 175
Moore, Minns *v.* – – – 241
Morleys (Birmingham), Ld. *v.* Slater – – – – 506
Morris Motors and Harris, Smith *v.* – – – – – 194

N. PAGE

Nagy, Welch *v.* 455
National Coal Board, Harrison *v.* 466
Nelson E. P. & Co. *v.* Rolfe 139
Nye, Schooley *v.* 335

O.

Old Gate Estates, Ld. *v.* Alexander 311
Oppenheim, Charles Rickards, Ld. *v.* 616
Owen, Zeidman *v.* 593

P.

Pacey *v.* Atkinson 539
Paget, Sorrell *v.* 252
Paris *v.* Stepney Borough Council 320
Parker, Lederer *v.* 90
Parkin, Rex *v.* 155
Payne, Copps *v.* 611
Pilling *v.* Abergele Urban District Council 636
Porter, Coughtrey *v.* 629
Probert, Standingford *v.* 377

R.

Railway Executive, Ex parte. The King *v.* St. Pancras Borough Assessment Committee 58
R. B. Policies at Lloyd's *v.* Butler 77
Rex *v.* Clarke 523
Rex *v.* Dickson 394
Rex *v.* Kritz 82
Rex *v.* Parkin 155
Rex *v.* Reynolds 606
Rex *v.* Somerset Justices. Ex parte Ernest J. Cole & Partners, Ld. 519
Rex *v.* Thomas 26
Reynolds, Rex *v.* 606
Rickards (Charles), Ld. *v.* Oppenheim 616
Roberts, Border R.D.C. *v.* 716
Rolfe, E. P. Nelson & Co. *v.* 139

S. PAGE

St. Pancras Borough Assessment Committee, The King *v.* Ex parte The Railway Executive 58
Schooley *v.* Nye 335
Shore, Goldsack *v.* 708
Slater, Morleys (Birmingham), Ld. *v.* 506
Smith *v.* Morris Motors, Ld. and Harris 194
Solle *v.* Butcher 671
Somerset J. J., Rex *v.* Ex parte Ernest J. Cole & Partners, Ld. 519
Sorrell *v.* Paget 252
Stag Line, Ld. *v.* Board of Trade 536
Standingford *v.* Probert 377
Stepney Borough Council, Paris *v.* 320
Stone *v.* Bolton 201
Storr, Gaisberg *v.* 107
Straker, Blackmill, Ld. *v.* 346
Surrey County Valuation Committee *v.* Chessington Zoo, Ld. 640

T.

Tamlin *v.* Hannaford 18
Thomas, Lewis *v.* 438
Thomas, Rex *v.* 26
Tillotson's Newspapers, Ld., Braddock *v.* 47

W.

Welch *v.* Nagy 455
Wheatley *v.* Wheatley 39
Williams *v.* Cardiff Corporation 514
Woodall Smith, Woozley *v.* 325
Woodside House (Wimbledon), Ld. *v.* Hutchinson 182
Woozley *v.* Woodall Smith 325

Y.

Youden, Johnson *v.* 544

Z.

Zeidman *v.* Owen 593

TABLE OF CASES CITED AND JUDICIALLY NOTICED.

ABBREVIATIONS.

Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

Aberaman Ex-Servicemen's Club and Institute *v.* Aberdare U.D.C.	[1948] 1 K. B. 332		Surrey County Valuation Committee *v.* Chessington Zoo Ld.	640
A'Court *v.* Cross	3 Bing. 329	*R.*	R. B. Policies at Lloyd's *v.* Butler	76
Addie, Robert, & Sons (Collieries) Ld. *v.* Dumbreck	[1929] A. C. 358	*R.*	Horton *v.* London Graving Dock Co. Ld. Williams *v.* Cardiff Corporation	421 514
Aksionairnoye Obschestvo A. M. Luther *v.* James Sagor & Co.	[1921] 3 K.B. 532.	*Dist.*	Boguslawski *v.* Gdynia-Ameryka Linie	157
Alberg *v.* Chandler	64 T. L. R. 394	*Appr.*	Law *v.* Dearnley	400
Albermarle Supply Co. *v.* Hind & Co.	[1928] 1 K. B. 307	*C.*	Sorrell *v.* Paget	252
Alexander *v.* Rayson	[1936] 1 K. B. 169	*C.*	Edler *v.* Auerbach	359
Anctil *v.* Manufacturers' Life Insurance Co.	[1899] A. C. 604	*R.*	Welch *v.* Nagy	455
Angel *v.* Jay	[1911] 1 K. B. 666	*F.* *C.*	Bacon *v.* Grimsby Corporation Edler *v.* Auerbach Solle *v.* Butcher	272 359 671
Anglo-Egyptian Navigation Co. *v.* Rennie	L. R. 10 C. P. 271		Richards, Charles Ld. *v.* Oppenhaim	616
Anglo-Italian Bank *v.* Davies	38 T. L. R. 197	*C.*	Lamont, Janos & Co. Ld. *v.* Hyland Ld.	585
Anstruther-Gough-Calthorpe *v.* McOscar	[1924] 1 K. B. 716		Cunliffe *v.* Goodman	267
Att.-Gen. *v.* Dyer	[1947] Ch. 67.		Lewis *v.* Thomas	438
Attorney-General *v.* Gas Light & Coke Co.	7 Ch. D. 217		Marriage *v.* East Norfolk Rivers Catchment Board	284
Att.-Gen. *v.* Great Northern Ry. Co.	[1916] 2 A. C. 536	*R.*	Copps *v.* Payne	611
Att.-Gen. *v.* Hemingway	81 J. P. 112		Lewis *v.* Thomas	438
Att.-Gen. *v.* London Stadiums Ld.	[1950] 1 K. B. 72	*Aff.*	Att.-Gen. *v.* London Stadiums Ld.	387
Att.-Gen. *v.* Luncheon and Sports Club Ld.	[1929] A. C. 400	*R.*	Zeidman *v.* Owen	593
Att.-Gen. *v.* Theobald	24 Q. B. D. 557		Hutchinson *v.* Jauncey	574
Baker *v.* Lewis	[1947] K. B. 186	*Dist.* *R.*	Littlechild *v.* Holt Lucas *v.* Lineham	1 548
Bankruptcy Notice, *In re* a	[1924] 2 Ch. 76	*R.*	Welch *v.* Nagy	455
Barton *v.* Fincham	[1921] 2 K. B. 291	*R.* *Appl.* *R.*	Welch *v.* Nagy Middleton *v.* Baldock (T.W.) Solle *v.* Butcher	455 657 671

Beauchamp, Earl *v.* Winn	L. R. 6 H. L. 223	*R.*	Solle *v.* Butcher.	671
Bell *v.* Lever Bros Ld.	[1932] A. C. 161	*R.*	Solle *v.* Butcher.	671
Bennett and Partners *v.* Millett	[1949] 1 K. B. 362		E. P. Nelson & Co. *v.* Rolfe	139
Besseler, Waechter, Glover & Co. *v.* South Derwent Coal Co. Ld.	[1938] 1 K. B. 408	*R.*	Rickard, Charles Ld. *v.* Oppenhaim	616
Bickett *v.* Morris	L. R. 1 Sc. & D. 47	*R.*	Marriage *v.* Rivers Catchment Board	284
Bilbao, Banco de *v.* Sancha	[1938] 2 K. B. 176		Boguslawski *v.* Gdynia-Ameryka Linie	157
Bingham *v.* Bingham	1 Ves. Sen. 126	*C.*	Solle *v.* Butcher.	671
Bird *v.* Baker	1 E. & E. 12		Colton *v.* Becollda Investments Ld.	216
Bird *v.* Hildage	[1948] 1 K. B. 91	*R.*	Rickards, Charles Ld. *v.* Oppenhaim	616
Black *v.* Fife Coal Co. Ld.	[1912] A. C. 149	*R.*	Harrison *v.* National Coal Board	466
Blake *v.* Beech	1 Ex. D. 320		Coughtrey *v.* Porter	629
Blay *v.* Dadswell	[1922] 1 K. B. 632		Stone *v.* Bolton	201
Board of Trade *v.* Cayzer, Irvine & Co.	[1927] A. C. 610		R. B. Policies at Lloyd's *v.* Butler	76
Bolsover Colliery Co. Ld. *v.* Abbott	[1946] K. B. 8		Littlechild *v.* Holt	1
Bottomley *v.* Bannister	[1932] 1 K. B. 458	*Appl.*	Edler *v.* Auerbach	359
Bowater *v.* Rowley Regis Corporation	[1944] K. B. 476	*R.*	Horton *v.* London Graving Dock Co. Ld.	421
Bowness *v.* O'Dwyer	[1948] 2 K. B. 210	*Appl.*	Welch *v.* Nagy	455
Boynton *v.* Ancholine Drainage Commissioners	[1921] 2 K. B. 213		Marriage *v.* East Norfolk Rivers Catchment Board	284
Brackley *v.* Midland Ry.	85 L. J. (K. B.) 1596	*R.*	Horton *v.* London Graving Dock Co. Ld.	421
Bradyll *v.* Ball	1 Bro. C. C. 427	*R.*	Sorrell *v.* Paget	252
Brakspear, W. H., and Sons, Ld. *v.* Barton	[1924] 2 K. B. 88	*R.*	Solle *v.* Butcher.	671
Bramwell *v.* Bramwell	[1942] 1 K. B. 370	*R.*	Middleton *v.* Baldock	657
Bretherton *v.* United Kingdom Totalisator Co. Ld.	[1945] K. B. 555	*C.*	Zeidman *v.* Owen	593
Briggs *v.* Thomas Dryden & Sons	[1925] 2 K. B. 667		Hales *v.* Bolton Leathers Ld.	493
British Empire Shipping Co. *v.* Jones	E. B. & E. 353	*R.*	Sorrell *v.* Paget	252
British and Foreign Marine Insurance Co. Ld. *v.* Samuel Sanday & Co.	[1916] 1 A. C. 650		Irvin *v.* Hine	555

British Launderers' Research Association *v.* Borough of Hendon Rating Authority	[1949] 1 K. B. 462	*R.*	Solle *v.* Butcher	671
Brock *v.* Wollams	[1949] 2 K. B. 388	*C.* *R.*	Standingford *v.* Probert Baxter *v.* Eckersley	377 480
Brown *v.* Brash	[1948] 2 K. B. 247		Old Gate Estates Ld. *v.* Alexander Morley's (Birmingham) Ld. *v.* Slater	311 506
Brown *v.* Dean	[1910] A. C. 373	*R.*	Braddock *v.* Tillotson's Newspapers Ld.	47
Brown *v.* Draper	[1944] K. B. 309	*F.* *R.* *Dist.* *R.*	Old Gate Estates Ld. *v.* Alexander Welch *v.* Nagy Middleton *v.* Baldock(T.W.) Solle *v.* Butcher	311 455 657 671
Bruner *v.* Moore	[1904] 1 Ch. 305	*R.*	Rickards, Charles Ld. *v.* Oppenhaim	616
Byrne *v.* Boadle	2 H. & C. 722	*R.*	Stone *v.* Bolton	201
Cadogan, Earl of *v.* Guinness	[1936] Ch. 515	*Appr.*	Colton *v.* Becollda Property Investments Ld.	216
Caledonian Ry. Co. *v.* Walker's Trustees	7 App. Cas. 293	*R.*	Marriage *v.* East Norfolk Rivers Catchment Board	284
Camillo Tank Steamship Co. Ld. *v.* Alexandria Engineering Co. Ld.	38 T. L. R. 134	*R.*	Law *v.* Dearnley	400
Canada and Dominion Sugar Co. Ld. *v.* Canadian National (West Indies) Steamships Ld.	[1947] A. C. 46		Solle *v.* Butcher	671
Canadian Pacific Ry. *v.* Paske	[1899] A. C. 535		Marriage *v.* East Norfolk Rivers Catchment Board	284
Cannon Brewery Co. Ld. *v.* Central Control Board (Liquor Traffic)	[1918] 2 Ch. 101; [1919] A. C. 744	*R.*	Tamlin *v.* Hannaford	18
Carras *v.* London and Scottish Assurance Corporation Ld.	40 Com. Cas. 288; [1936] 1 K. B. 291	*R.*	Irvin *v.* Hine	555
Cartwright *v.* Sculcoates Union	[1900] A. C. 150	*R.*	Surrey County Valuation Committee *v.* Chessington Zoo Ld.	640
Castle *v.* St. Augustine's Links Ld.	38 T. L. R. 615	*Dist.*	Stone *v.* Bolton	201
Cavalier *v.* Pope	[1906] A. C. 432	*R.*	Horton *v.* London Graving Dock Co. Ld.	421
Celia, S.S. *v.* S.S. Volturno	[1921] 2 A. C. 544		Irvin *v.* Hine	555

Central London Property Trust Ld. *v.* High Trees House Ld.	[1947] K. B. 130	*R.*	E. P. Nelson & Co. *v.* Rolfe Rickards, Charles Ld. *v.* Oppenhaim	139 616
Clark *v.* Fisherton-Angar Overseers	6 Q. B. D. 139	*R.*	Surrey County Valuation Committee *v.* Chessington Zoo Ld.	640
Clowes *v.* Staffordshire Potteries Waterworks Co.	L. R. 8 Ch. 125	*R.*	Marriage *v.* East Norfolk Rivers Catchment Board	284
Coburn *v.* College	[1897] 1 Q. B. 702		R. B. Policies at Lloyd's *v.* Butler	76
Cocking *v.* Ward	1 C. B. 858	*R.*	Law *v.* Dearnley	400
Cohen *v.* Black	58 T. L. R. 306		Rex *v.* Clarke	523
Cohen, G., Sons & Co. Ld. *v.* Standard Marine Insurance	30 Com. Cas. 139		Irvin *v.* Hine	555
Cohen *v.* West Ham Corporation	[1933] Ch. 814	*F.*	Bacon *v.* Grimsby Corporation	272
Colak Corporation *v.* Summerfield	[1893] A. C. 187	*R.*	Marriage *v.* East Norfolk Rivers Catchment Board	284
Cole *v.* Harris	[1945] K.B.474	*Dist.*	Mitchell *v.* Barnes	448
Collis *v.* Flower	[1921] 1 K. B. 409	*R.*	Harrison *v.* Hopkins	124
Concannon *v.* Beardshaw	[1940] I. R. 243		Solle *v.* Butcher	671
Cook *v.* Hobbs	[1911] 1 K. B. 14		Keeble *v.* Miller	601
Cooke *v.* Midland Great Western Ry. Co.	[1909] A. C. 229	*R.*	Williams *v.* Cardiff Corporation	514
Cooper *v.* Phibbs	L. R. 2 H. L. 149	*C.*	Solle *v.* Butcher	67
Court *v.* Sheen	7 T. L. R. 556	*R.*	Lamont, James, & Co. Ld. *v.* Hyland Ld.	585
Court Line *v.* The King	[1945] W. N. 147; 61 T. L. R. 418		Irvin *v.* Hine	555
Crawford *v.* Toogood	13 Ch. D. 153	*F.*	Rickards, Charles *v.* Oppenhaim	617
Croft *v.* Lumley	5 E. & B. 648	*R.*	Clarke *v.* Grant	104
Cruise *v.* Terrell	[1922] 1 K. B. 664	*R.*	Hutchinson *v.* Jauncey	574
Cundy *v.* Lindsay	1 Q. B. D. 348; 3 App. Cas. 459	*R.*	Solle *v.* Butcher	671
Curl *v.* Angelo	[1948] L. J. R. 1756		Morley's (Birmingham) Ld. *v.* Slater	506
Cutler *v.* Wandsworth Stadium Ld.	[1949] A. C. 398	*R.*	Marriage *v.* East Norfolk Rivers Catchment Board	284
Dakin & Co. Ld. *v.* Lee	[1916] 1 K. B. 566		Rickards, Charles Ld. *v.* Oppenhaim	616
Darrall *v.* Whitaker	92 L. J. (K. B.) 882		Solle *v.* Butcher	671

David *v.* Brittanic Merthyr Coal Co.	[1909] 2 K. B. 146	*C.*	Harrison *v.* National Coal Board . .	466
Davies *v.* Batger & Co. Ld.	Unreported, April 1, 1943	*R.*	Smith *v.* Morris Motors Ld. and Harris . .	194
Davies *v.* Bristow . .	[1920] 3 K. B. 428	*Appr.*	Clarke *v.* Grant .	104
Davies *v.* Warwick .	[1943] K. B. 329	*R.*	Minns *v.* Moore . Mitchell *v.* Barnes . .	241 448
Day *v.* William Hill (Park Lane) Ld.	[1949] 1 K. B. 632	*R.*	Law *v.* Dearnley	400
Denman *v.* Brise . .	[1949] 1 K. B. 22		Solle *v.* Butcher.	671
Dennis Reed Ld. *v.* Nicholls	[1945] 2 All E. R. 914		E. P. Nelson & Co. *v.* Rolfe .	139
Dexters Ld. *v.* Hill Crest Oil Co. (Bradford) Ld.	[1926] 1 K. B. 348	*Appl.*	Baxter *v.* Eckersley .	480
Dodds *v.* South Shields Assessment Committee	[1895] 2 Q. B. 133	*R.*	Surrey County Valuation Committee *v.* Chessington Zoo Ld. .	640
Doe d. Cheny *v.* Batten .	1 Cowp. 243 .	*R.*	Clarke *v.* Grant .	104
Dollman *v.* A. & S. Hillman Ld.	[1941] 1 All E. R. 355		Stone *v.* Bolton .	201
Donoghue *v.* Stevenson .	[1932] A. C. 562	*Appl.*	Horton *v.* London Graving Dock Co. Ld. . Marriage *v.* East Norfolk Rivers Catchment Board .	421 284
Douglas *v.* Forrest . .	4 Bing. 686 .		R. B. Policies at Lloyd's *v.* Butler . .	76
Dudley, Clarke and Hall *v.* Cooper, Ewing & Co.	[1920] 3 K. B. 487 noted		Rickards, Charles Ld. *v.* Oppenhaim .	616
Dyson *v.* Att.-Gen. .	[1911] 1 K. B. 410	*R.*	Law *v.* Dearnley	400
East Suffolk Rivers Catchment Board *v.* Kent	[1941] A. C. 74	*R.*	Marriage *v.* East Norfolk Rivers Catchment Board .	284
East and West India Docks *v.* Gattke	3 Mac. & G. 155	*R.*	Marriage *v.* East Norfolk Rivers Catchment Board .	284
Eaton *v.* George Wimpey & Co. Ld.	[1938] 1 K. B. 353	*C. and Appl.*	Hales *v.* Bolton Leathers Ld. .	493
Edinburgh Street Tramways *v.* Edinburgh Corporation	[1894] A. C. 456	*R.*	Surrey County Valuation Committee *v.* Chessington Zoo Ld. .	640
Elcock *v.* Thomson .	[1949] 2 K. B. 755		Irvin *v.* Hine .	555
Elderton *v.* United Kingdom Totalisator Co. Ld.	[1946] Ch. 57	*Dicta N.F.*	Zeidman *v.* Owen . .	593
Elkington *v.* Kesley .	[1948] 2 K. B. 256	*R.*	Smith *v.* Morris Motors Ld. and Harris . .	194

Ellis & Sons Amalgamated Properties *v.* Sisman	[1948] 1 K. B. 653	*E. and Dist.* *R.*	Morley's (Birmingham) Ld. *v.* Slater Solle *v.* Butcher	506 671
Embericos *v.* S. Read & Co.	[1914] 3 K. B. 45		Irvin *v.* Hine	555
Epps *v.* Rothnie	[1945] K. B. 562	*R.*	Littlechild *v.* Holt Lucas *v.* Lineham	1 548
Erith Corporation *v.* Holder	[1949] 2 K. B. 46	*R.*	Minister of Agriculture and Fisheries *v.* Matthews	148
Erlanger *v.* New Sombrero Phosphate Co.	3 App. Cas. 1218	*R.*	Solle *v.* Butcher	671
Ethiopia, Bank of *v.* National Bank of Egypt and Ligouri	[1937] 1 Ch. 513		Boguslawski *v.* Gdynia-Ameryka Linie	157
Evans *v.* Evans	[1948] 1 K. B. 175	*F.*	Wheatley *v.* Wheatley	39
Evans (Joseph) & Co. Ld. *v.* Heathcote	[1918] 1 K. B. 418	*R.*	Law *v.* Dearnley	400
Eyre *v.* Brumfield	52 T. L. R. 454	*R.*	Coughtrey *v.* Porter	629
Eyre *v.* Johnson	[1946] K. B. 481		James *v.* Hutton and J. Cook & Sons Ld.	9
Eyre *v.* Rea	[1947] K. B. 567	*Dist.*	James *v.* Hutton and J. Cook & Sons Ld. Cunliffe *v.* Goodman	9 267
Fairman *v.* Perpetual Investment Building Society	[1923] A. C. 74		Horton *v.* London Graving Dock Co. Ld.	421
Falcke *v.* Scottish Imperial Assurance Co.	34 Ch. D. 234	*R.*	Sorrell *v.* Paget	252
Farnworth *v.* Manchester Corporation	[1929] 1 K. B. 533 [1930] A. C. 171	*C.*	Marriage *v.* East Norfolk Rivers Catchment Board	284
Fibrosa Spolka Akcyjna *v.* Fairbairn Combe Barbour Ld.	[1943] A. C. 32, 64	*R.*	Edler *v.* Auerbach	359
Field *v.* Gover	[1944] K. B. 200		Minns *v.* Moore	241
Fillingham (Arthur) & Sons *v.* Hall	(Not reported.) Oct. 30, 1935	*R.*	Manley *v.* Dobson	100
Finch *v.* Finch	[1945] 1 All E. R. 580		Gaisberg *v.* Storr	107
Flatman *v.* Poole	[1937] 1 All E. R. 495	*R.*	Manley *v.* Dobson	100
Foot Clinics (1943) Ld. *v.* Cooper's Gowns Ld.	[1947] K. B. 506	*R.*	Rickards, Charles Ld. *v.* Oppenhaim	616
Fowle *v.* Bell	[1947] 2 K. B. 242	*Dist.*	Littlechild *v.* Holt Lucas *v.* Lineham	1 548
Fox *v.* Neal	13 L. J. C. C. R. 220	*O.*	Kestell *v.* Langmaid	233
Freeman *v.* Dartford Brewery Co. Ld.	[1938] 3 All E. R. 120		Schooley *v.* Nye	335
Fritz *v.* Hobson	14 Ch. D. 542		Stone *v.* Bolton	201
Garrard *v.* Frankel	30 Beav. 445	*F.*	Solle *v.* Butcher	671
Geddis *v.* Bann Reservoir Proprietors	3 App. Cas. 430	*Appl.*	Marriage *v.* East Norfolk Rivers Catchment Board	284

Gerrard *v.* Crowe	[1921] 1 A. C. 395	*R.*	Marriage *v.* East Norfolk Rivers Catchment Board	284
Gibbs *v.* Guild, E.	9 Q. B. D. 59		R. B. Policies at Lloyd's *v.* Butler	76
Gibraltar Sanitary Commissioners *v.* Orfila	15 App. Cas. 400		Tamlin *v.* Hannaford	18
Gibson, George, & Co. *v.* Wishart	[1915] A. C. 18		Hales *v.* Bolton Leathers Ld.	493
Gilbert *v.* Corporation of Trinity House	17 Q. B. D. 795	*R.*	Tamlin *v.* Hannaford	18
Glasgow Corporation *v.* Taylor	[1922] 1 A. C. 44	*R.*	Stone *v.* Bolton Williams *v.* Cardiff Corporation	201 514
Glennie *v.* Imrie	3 Y. & C. 436	*C.*	Lamont, James, Ld. & Co. *v.* Hyland Ld.	585
Gloucester, Bishop of, *v.* Cunnington	[1943] K. B. 101	*R.*	Blackmill Ld. *v.* Straker	346
Glynn *v.* Thomas	11 Exch. 870	*C.*	Sorrell *v.* Paget	252
Graham *v.* Public Works Commissioners	[1901] 2 K. B. 781		Tamlin *v.* Hannaford	18
Granger *v.* George	5 B. & C. 149		R. B. Policies at Lloyd's *v.* Butler	76
Greatorex *v.* Shackle	[1895] 2 Q. B. 249		E. P. Nelson & Co. *v.* Rolfe	139
Green *v.* Sevin	13 Ch. D. 589		Rickards, Charles Ld. *v.* Oppenhaim	616
Gregory *v.* Hurrill	5 B. & C. 341	*R.*	R. B. Policies at Lloyd's *v.* Butler	76
Griffiths *v.* Smith	[1941] A. C. 170	*R.*	Horton *v.* London Graving Dock Co. Ld.	421
Grimwood *v.* Moss	L. R. 7 C. P. 360	*R.*	Hutchinson *v.* Jauncey	574
Guaranty Trust Co. *v.* United States	304 U. S. 126		Boguslawski *v.* Gdynia-Ameryka Linie	157
Gugenheim *v.* Ladbroke & Co. Ld.	[1947] 1 All E. R. 292	*C.*	Law *v.* Dearnley	400
Gulliver *v.* Cosens	1 C. B. 788	*C.* *F.*	Sorrell *v.* Paget	252
H. *v.* H.	63 T. L. R. 645	*R.*	Old Gate Estates Ld. *v.* Alexander Middleton *v.* Baldock, T. W.	311 657
Hadley *v.* Perks	L. R. 1 Q. B. 444	*R.*	Wheatley *v.* Wheatley	39
Haile Selassie *v.* Cable and Wireless Ld. (No. 2)	[1939] Ch. 182		Boguslawski *v.* Gdynia-Ameryka Linie	157
Hall *v.* Bristol Corporation	L. R. 2 C. P. 322	*R.*	Marriage *v.* East Norfolk Rivers Catchment Board	284
Hammersmith Ry. Co. *v.* Brand	L. R. 4 H. L. 171	*R.*	Marriage *v.* East Norfolk Rivers Catchment Board	284
Hardy *v.* Fothergill	13 App. Cas. 351		James *v.* Hutton and J. Cook & Sons Ld.	9

Hart *v.* Windsor	12 M. & W. 68	*Appl.*	Edler *v.* Auerbach	359
Hartell *v.* Blackler	[1920] 2 K. B. 161	*O.*	Clarke *v.* Grant	104
Hartley *v.* Ellnor	117 L. T. 304		Rex *v.* Clarke	523
Hartley *v.* Hymans	[1920] 3 K. B. 475	*F.*	Rickards, Charles Ld. *v.* Oppenhaim	616
Haseldine *v.* Daw	[1941] 2 K. B. 343	*R.*	Horton *v.* London Graving Dock Co. Ld.	421
Haskins *v.* Lewis	[1931] 2 K. B. 1	*R.*	Mitchell *v.* Barnes	448
Heaven *v.* Pender	11 Q. B. D. 503	*E. and Appl.*	Horton *v.* London Graving Dock Co. Ld.	421
Hemns *v.* Wheeler	[1948] 2 K. B. 61	*R.*	Solle *v.* Butcher	671
Henley *v.* Walsh	2 Salk. 686	*R.*	Sorrell *v.* Paget	252
Hick *v.* Raymond and Reid	[1893] A. C. 22	*R.*	Rickards, Charles Ld. *v.* Oppenhaim	616
Hill *v.* Metropolitan Asylum Commissioners	4 Q. B. D. 433		Marriage *v.* East Norfolk Rivers Catchment Board	284
Hill *v.* William Hill (Park Lane) Ld.	[1949] A. C. 530	*R.*	Law *v.* Dearnley	400
Hillen *v.* I.C.I. (Alkali) Ld.	[1934] 1 K. B. 455	*R.*	Horton *v.* London Graving Dock Co. Ld.	421
Hitchcock *v.* Way	6 Ad. & E. 943		Hutchinson *v.* Jauncey	574
Hodgson *v.* British Arc Welding Co.	[1946] K. B. 302		Horton *v.* London Graving Dock Co. Ld.	421
Hoerler (trading as C. F. Mumm) *v.* Hanover Caoutchouc, Gutta Percha and Telegraph Works	10 T. L. R. 22, 103	*Appl.*	International Corporation Ld. *v.* Besser Manufacturing Co.	488
Holmes *v.* Kaye, Sons & Co. Ld.	27 B. W. C. C. 116		Hales *v.* Bolton Leathers Ld.	493
Home and Colonial Insurance Co. Ld., *In re*	[1930] 1 Ch. 102	*R.*	Law *v.* Dearnley	400
Hopes *v.* Hopes	[1949] P. 227	*D.*	Wheatley *v.* Wheatley	39
Horton *v.* London Graving Dock Co. Ld.	[1949] 2 K. B. 584	*Rev.*	Horton *v.* London Graving Dock Co. Ld.	421
Hubbard *v.* Messenger	[1938] 1 K. B. 300		Keeble *v.* Miller	601
Huddersfield Banking Co. Ld. *v.* Lister	[1895] 2 Ch. 273	*R.*	Solle *v.* Butcher	671
Hue *v.* Whiteley	[1929] 1 Ch. 440	*R.*	Lewis *v.* Thomas	438
Hunt *v.* Bliss, Dicta in	[1919] W. N. 331	*R.*	Clarke *v.* Grant	104
Hyams *v.* Stuart King	[1905] 2 K. B. 696	*R.*	Law *v.* Dearnley	400
Hyett *v.* G.W.R. Co.	[1948] 1 K. B. 345		Horton *v.* London Graving Dock Co. Ld.	421
Hyman *v.* Hyman	[1929] A. C. 601	*R.*	Gaisberg *v.* Storr	107
Imperial Gas Light & Coke Co. *v.* Broadbent	7 H. L. C. 600		Marriage *v.* East Norfolk Rivers Catchment Board	284

Indermaur *v.* Dames	L. R. 1 C. P. 274	*C. and E.*	Horton *v.* London Graving Dock Co. Ld.	421
Ingall *v.* Moran	[1944] K. B. 160		Fred Long & Son Ld. *v.* Burgess	115
Insall *v.* Nottingham Corporation	[1949] 1 K. B. 261		Blackmill Ld. *v.* Straker	346
International Ry. Co. *v.* Niagara Parks Commission	[1941] A. C. 328	*R.*	Tamlin *v.* Hannaford	18
J. & F. Stone Lighting and Radio Co. Ld. *v.* Levitt	[1947] A. C. 209	*C.*	Woozley *v.* Woodall Smith	325
J. F. Stone Lighting and Radio Ld. *v.* Levitt	[1947] A. C. 209	*Appl.*	Welch *v.* Nagy	455
Jackson *v.* Jackson	[1924] P. 19.	*R.*	Wheatley *v.* Wheatley	39
Jackson *v.* Murphy	4 T. L. R. 92	*R.*	Lamont, James, & Co. Ld. *v.* Hyland Ld.	585
Jacobs *v.* London County Council	[1949] 1 K. B. 685		Horton *v.* London Graving Dock Co. Ld.	421
Jarvin, Inhabitants of, *Ex p.*	9 Dowl. 120	*F.*	Rex *v.* Somerset Justices	519
Jervis *v.* Tomkinson	1 H. & N. 195	*R.*	Colton *v.* Becollda Property Investments Ld.	216
John, *In re*, Jones *v.* John	[1933] Ch. 370		Bacon *v.* Grimsby Corporation	272
Jones *v.* Bates	158 L. T. 507.	*R.*	Lewis *v.* Thomas	438
Jones *v.* Gibbons	8 Ex. 920		Rickards, Charles Ld. *v.* Oppenhaim	616
Joyner *v.* Weeks	[1891] 2 Q. B. 31	*R.*	James *v.* Hutton and J. Cook & Sons Ld.	9
Jozwiak *v.* Hierowski	64 T. L. R. 322	*Appl.*	Welch *v.* Nagy	455
Julius *v.* Bishop of Oxford	5 App. Cas. 244	*R.*	Border R.D.C. *v.* Roberts	716
Keppel *v.* Wheeler	[1927] 1 K. B. 577		E. P. Nelson & Co. *v.* Rolfe	139
Kerr *v.* Bryde	[1923] A. C. 16		Baxter *v.* Eckersley	480
Kershaw *v.* Sieviet	21 T. L. R. 40	*R.*	Law *v.* Dearnley	400
King *v.* Port of London Authority	[1920] A. C. 1		Hales *v.* Bolton Leathers Ld.	493
King's Norton Metal Co. Ld. *v.* Edridge	14 T. L. R. 98	*R.*	Solle *v.* Butcher	671
Kingston Union Assessment Committee *v.* Metropolitan Water Board	[1926] A. C. 331	*R.*	Surrey County Valuation Committee *v.* Chessington Zoo Ld.	640
Kirk *v.* Eustace	[1937] A.C. 491		Gaisberg *v.* Storr	107
Kulukundis *v.* Norwich Union Fire Insurance Society	41 Com. Cas. 239; [1937] 1 K. B. 1		Irvin *v.* Hine	555
Langford Property Co. *v.* Batten	65 T. L. R. 577	*C.*	Solle *v.* Butcher	671
Lansdown *v.* Lansdown	Mos. 364	*C.*	Solle *v.* Butcher	671
Latham *v.* R. Johnson & Nephew Ld.	[1913] 1 K. B. 398	*R.*	Williams *v.* Cardiff Corporation	514
Lawrance *v.* Norreys (Lord)	15 App. Cas. 210	*R.*	Law *v.* Dearnley	400

Lawrence *v.* Hartwell .	[1946] K. B. 553	*F.*	Harrison *v.* Hopkins .	124
Laycock, *In re*, *v.* Pickles	4 B. & S. 497	*R.*	Law *v.* Dearnley	400
Lazard Bros. *v.* Midland Bank	[1933] A. C. 289		Boguslawski *v.* Gdynia - Ameryka Linie .	157
			Moat *v.* Martin .	175
Lea *v.* K. Carter Ld. .	[1949] 1 K. B. 85	*R.*	Stone *v.* Bolton .	201
Leanse *v.* Egerton . .	[1943] K. B. 329		Minns *v.* Moore .	241
Lederer *v.* Parker . .	[1950] 1 K. B. 90	*R.*	Rex *v.* Clarke .	523
Ledwith *v.* Roberts. .	[1937] 1 K. B. 232	*C.*	James *v.* Hutton and J. Cook & Sons Ld. .	9
Legh *v.* Lillie . .	6 H. & N. 165			
Le Lievre *v.* Gould .	[1893] 1 Q. B. 491	*R.*	Horton *v.* London Graving Dock Co. Ld. .	421
Leslie & Co. Ld. *v.* Cumming	[1926] 2 K. B. 417	*Dist.*	Hutchinson *v.* Jauncey . Woozley *v.* Woodall Smith	574 325
Letang *v.* Ottawa Electric Ry. Co.	[1926] A. C. 725	*R.*	Horton *v.* London Graving Dock Co. Ld. .	421
Lever Brothers Ld. *v.* Bell	[1931] 1 K. B. 557	*C.*	Solle *v.* Butcher.	671
Lever Bros. Ld. *v.* Inland Revenue	[1938] 2 K. B. 518	*R.*	Att.-Gen. *v.* London Stadiums Ld.	72,387
Lewisham Borough Council *v.* Maloney	[1948] 1 K. B. 50	*R.*	Minister of Agriculture and Fisheries *v.* Matthews .	148
Lewisham Borough Council *v.* Roberts	[1949] 2 K. B. 608	*R.*	Minister of Agriculture and Fisheries *v.* Matthews .	148
Liddle *v.* Yorkshire (North Riding) County Council	[1934] 2 K. B. 101	*C.*	Williams *v.* Cardiff Corporation .	514
Lindon *v.* Hooper . .	1 Cowp. 414 .	*R.*	Sorrell *v.* Paget .	252
Lindop *v.* Quaife . .	[1949] W. N. 77	*R.*	Mitchell *v.* Barnes . .	448
Lindsay *v.* Cundy . .	1 Q. B. D. 348; 3 App. Cas. 459	*R.*	Solle *v.* Butcher.	671
Littlechild *v.* Holt . .	[1950] 1 K. B. 1	*E. and Appl.*	Lucas *v.* Lineham	548
Lloyds Bank *v.* Elliott .	[1947] 1 All E. R. 79		Kestell *v.* Langmaid .	233
Lochgelly Iron & Coal Co. *v.* M'Mullan	[1934] A. C. 1		Marriage *v.* East Norfolk Rivers Catchment Board .	284
London County Council *v.* Lee	[1914] 3 K. B. 255	*R.*	Manley *v.* Dobson	100
Lumsden *v.* Inland Revenue Commissioners	[1914] A. C. 877	*R.*	Att.-Gen. *v.* London Stadiums Ld. .	387
Luxor (Eastbourne) Ld. *v.* Cooper	[1941] A. C. 108	*R.*	E. P. Nelson & Co. *v.* Rolfe .	141
McClelland *v.* Manchester Corporation	[1912] 1 K. B. 118		Marriage *v.* East Norfolk Rivers Catchment Board .	284

McIntyre *v.* Hardcastle	[1948] 2 K. B. 82	*R.*	Harrison *v.* Hopkins	124
MacKenzie *v.* Bank of Canada	[1934] A. C. 468	*R.*	Solle *v.* Butcher	671
Mackley *v.* Nutting	[1949] 2 K. B. 55	*R.*	Harrison *v.* Hopkins	124
MacMillan & Co. Ld. *v.* Rees	[1946] W. N. 88	*R.*	Mitchell *v.* Barnes	448
Manchester Corporation *v.* Farnworth	[1930] A. C. 171	*Appl.*	Marriage *v.* East Norfolk Rivers Catchment Board	284
Mann *v.* Merrill	61 T. L. R. 355		Solle *v.* Butcher	671
Marchbank *v.* Campbell	[1923] 1 K. B. 245		Solle *v.* Butcher	671
Maritime Electric Co. Ld. *v.* General Dairies Ld.	[1937] A. C. 610	*Appl.*	Welch *v.* Nagy	455
Marney *v.* Scott	[1899] 1 Q. B. 986		Horton *v.* London Graving Dock Co. Ld.	421
Marriage *v.* East Norfolk Rivers Catchment Board	[1949] 2 K. B. 456	*Aff.*	Marriage *v.* East Norfolk Rivers Catchment Board	284
Massey *v.* S. & P. Lingwood Ld.	June 21, 1945 unreported	*R.*	Smith *v.* Morris Motors Ld. and Harris	194
Matthey *v.* Curling	[1922] A. C. 180	*R.*	James *v.* Hutton and J. Cook & Sons Ld.	9
Mayn *v.* Beak	Cro. Eliz. 515		Colton *v.* Becollda Property Investments Ld.	216
Menzies *v.* Breadalbane	3 Bli. N. S. 414	*R.*	Marriage *v.* East Norfolk Rivers Catchment Board	284
Mersey Docks and Harbour Board *v.* Birkenhead Assessment Committee	[1900] 1 Q. B. 143; [1901] A. C. 175		Surrey County Council *v.* Chessington Zoo Ld.	640
Mersey Docks and Harbour Board *v.* Cameron	11 H. L. C. 443		Tamlin *v.* Hannaford	18
Mersey Docks and Harbour Board *v.* Gibbs	L. R. 1 H. L. 93		Marriage *v.* East Norfolk Rivers Catchment Board	284
Mersey Docks and Harbour Board *v.* Liverpool Overseers	L. R. 9 Q. B. 84	*R.*	Surrey County Valuation Committee *v.* Chessington Zoo Ld.	640
Mersey Docks and Harbour Board *v.* Lucas	51 L. J. (Q. B.) 114	*R.*	Surrey County Valuation Committee *v.* Chessington Zoo Ld.	640
Merstham Manor Ld. *v.* Coulsdon and Purley U.D.C.	[1937] 2 K. B. 77	*R.*	Lewis *v.* Thomas	438
Metropolitan Asylum District Commissioners *v.* Hill	6 App. Cas. 193	*R.*	Marriage *v.* East Norfolk Rivers Catchment Board	284
Midwood & Co. *v.* Manchester Corporation	[1905] 2 K. B. 597		Stone *v.* Bolton	201

Mitchell *v.* Barnes	[1950] 1 K. B. 448	*R.*	Solle *v.* Butcher	671
Morgan *v.* Ashcroft	[1938] 1 K. B. 49	*R.*	Law *v.* Dearnley	400
Morgan *v.* Hardy	17 Q. B. D. 770; 18 Q. B. D. 646; 35 W. R. 588		James *v.* Hutton and J. Cook & Sons Ld.	9
Morgan *v.* Richardson	7 East. 482 n.	*R.*	Lamont, James, & Co. Ld. *v.* Hyland Ld.	585
Morgan & Son *v.* Martin Johnson & Co. Ld.	[1949] 1 K. B. 107	*R.*	Lamont, James, & Co. Ld. *v.* Hyland Ld.	585
Morley *v.* Staffordshire County Council	83 S. J. 848	*R.*	Williams *v.* Cardiff Corporation	514
Moser *v.* Ambleside U.D.C.	89 J. P. 59, 118	*R.*	Lewis *v.* Thomas	438
Moss *v.* Smith	9 C. B. 94		Irvin *v.* Hine	555
Mowbray *v.* Merryweather	[1895] 2 Q. B. 640		Horton *v.* London Graving Dock Co. Ld.	421
Nash *v.* High Duty Alloys Ld.	[1947] K. B. 377	*R.*	Smith *v.* Morris Motors Ld. and Harris	194
Nash *v.* Rochford Rural Council	[1917] 1 K. B. 384	*R.*	Braddock *v.* Tillotson's Newspapers Ld.	47
Neale *v.* Del Soto	[1945] K. B. 144	*R.*	Hutchinson *v.* Jauncey	574
Neale *v.* Jennings	[1946] K. B. 738	*R.*	Blackmill Ld. *v.* Straker	346
New Zealand Shipping Co. Ld. *v.* Société des Ateliers et Chantiers de France	[1919] A. C. 1	*R.*	Baxter *v.* Eckersley	480
Nicholson and Venn *v.* Smith Marriott	177 L. T. 189	*Q.*	Solle *v.* Butcher	671
Norman *v.* G.W.R. Co.	[1915] 1 K. B. 584	*R.*	Horton *v.* London Graving Dock Co. Ld.	421
Northampton Corporation *v.* Ellen	[1904] 1 K. B. 299	*R.*	Border R.D.C. *v.* Roberts	716
North Western Salt Co. Ld. *v.* Electrolytic Co. Ld.	[1914] A. C. 461	*Appl.*	Edler *v.* Auerbach	359
Norwich Union Fire Insurance Society Ld. *v.* William H. Price Ld.	[1934] A. C. 455	*R.*	Solle *v.* Butcher	671
Old Gate Estates Ld. *v.* Alexander	[1950] 1 K. B. 311	*Dist.*	Middleton *v.* Baldock (T.W.)	657
Oliver *v.* Saddler & Co.	[1929] A. C. 584	*R.*	Horton *v.* London Graving Dock Co. Ld.	421
Osborne *v.* L. & N. W. Ry. Co.	21 Q. B. D. 220		Horton *v.* London Graving Dock Co. Ld.	421
Owen *v.* Nicholl	[1948] 1 All E. R. 707		Schooley *v.* Nye	335
Paget *v.* Marshall	28 Ch. D. 255	*F.*	Solle *v.* Butcher	671
Palgrave, Brown & Son Ld. *v.* S.S. Turid	[1922] 1 A. C. 397		Irvin *v.* Hine	555
Panoutsos *v.* Raymond Hadley Corporation of New York	[1917] 2 K. B. 473	*R.*	Rickards, Charles Ld. *v.* Oppenhaim	616

Parker *v.* Rosenberg	[1947] K. B. 371	*Dist.*	Harrison *v.* Hopkins	124
Peat's Case	6 Mod. 229	*R.*	Rex *v.* Somerset Justices	519
Phillips *v.* Barnett	[1922] 1 K. B. 222	*R.*	Mitchell *v.* Barnes	448
Phillips *v.* Barnett	[1922] 1 K. B. 222	*C.*	Solle *v.* Butcher	671
Phillips *v.* Welton	[1948] 2 All E. R. 845		Baxter *v.* Eckersley	480
Pitman *v.* Universal Marine Insurance Co.	9 Q. B. D. 192		Irvin *v.* Hine	555
Plevins *v.* Downing	1 C. P. D. 220	*R.*	Rickards, Charles Ld. *v.* Oppenhaim	616
Pollurian Steamship Co. *v.* Young	19 Com. Cas. 143; [1915] 1 K. B. 922	*R.*	Irvin *v.* Hine	555
Poole *v.* Huskinson	11 M. & W. 827	*R.*	Lewis *v.* Thomas	438
Potts *v.* Reid	[1943] A. C. 1	*R.*	Harrison *v.* National Coal Board	466
Powell *v.* Cleland	[1948] 1 K. B. 262	*R.*	Littlechild *v.* Holt	1
		R.	Lucas *v.* Lineham	548
Price *v.* Gould	143 L. T. 333	*C.*	Standingford *v.* Probert	377
Prout *v.* Hunter	[1924] 2 K. B. 736	*Dist.*	Woozley *v.* Woodall Smith	325
			Hutchinson *v.* Jauncey	574
			Morley's (Birmingham) Ld. *v.* Slater	506
R. & P. Properties Ld. *v.* Baldwin	[1939] 1 K. B. 461	*R.*	Solle *v.* Butcher	671
Racecourse Betting Control Board *v.* Brighton Corporation	[1941] 2 K. B. 287	*R.*	Surrey County Valuation Committee *v.* Chessington Zoo Ld.	640
Raleigh Corporation *v.* Williams	[1893] A. C. 540	*R.*	Marriage *v.* East Norfolk Rivers Catchment Board	284
Rawlings *v.* General Trading Co.	[1921] 1 K. B. 635	*R.*	Edler *v.* Auerbach	359
Rawlings *v.* Smith	[1938] 1 K. B. 675		Rex *v.* Clarke	523
Read *v.* Bonham	3 Brod. & B. 147	*R.*	Irvin *v.* Hine	555
Read *v.* J. Lyons & Co. Ld.	[1945] K. B. 216		Stone *v.* Bolton	201
Rees *v.* Hughes	[1946] K. B. 517		Middleton *v.* Baldock, T. W.	657
Reg. *v.* Friel	17 Cox C. C. 325	*R.*	Rex *v.* Thomas	26
Reg. *v.* Hughes	4 Q. B. D. 614		Coughtrey *v.* Porter	629
Reg. *v.* Miles	24 Q. B. D. 423	*R.*	Rex *v.* Thomas	26
Reg. *v.* Morris	L. R. 1 C. C. R. 90; 10 Cox C. C. 480	*R.*	Rex *v.* Thomas	26
Reg. *v.* Verrall	1 Q. B. D. 9	*R.*	Surrey County Valuation Committee *v.* Chessington Zoo Ld.	640

Remmington *v.* Larchin	[1921] 3 K. B. 404	*C.*	Minns *v.* Moore	241
Remon *v.* City of London Real Property Co. Ld.	[1921] 1 K. B. 49	*Appl.*	Hutchinson *v.* Jauncey	574
Rentit Ld. *v.* Oaten	[1938] L. J. N. C. C. R. 137	*R.*	Welch *v.* Nagy	455
Rex *v.* Barlow and Jeans	Carthew 293	*R.*	Border R.D.C. *v.* Roberts	716
Rex *v.* Browes	[1949] W. N. 343		Rex *v.* Dickson	394
Rex *v.* Carpenter	22 Cox C. C. 618	*Appr.*	Rex *v.* Kritz	82
Rex *v.* Clayton	65 T.L.R. 329 n.		Johnson *v.* Youden	544
Rex *v.* Copestake	[1927] 1 K. B. 468	*R.*	Braddock *v.* Tillotson's Newspapers Ld.	47
Rex *v.* Davis	[1943] K. B. 274		Rex *v.* Dickson	394
Rex *v.* Dunne	21 Cr. App. R. 176	*R.*	Rex *v.* Reynolds	606
Rex *v.* Fairbairn	[1949] 2 K. B. 690	*C.*	Rex *v.* Clarke	523
Rex *v.* Hamilton	13 Cr. App. R. 32	*R.*	Braddock *v.* Tillotson's Newspapers Ld.	47
Rex *v.* Horsley	8 East 405	*R.*	Fred Long & Son Ld. *v.* Burgess	115
Rex *v.* Hunt	13 Cr. App. R. 155	*R.*	Rex *v.* Kritz	82
Rex *v.* Mann	1 Stra. 97	*R.*	Fred Long & Son Ld. *v.* Burgess	115
Rex *v.* Parker and Bulteel	25 Cox C. C. 145	*R.*	Rex *v.* Kritz	82
Rex *v.* Pembrokeshire Justices	2 B. & Ad. 391	*R.*	Rex *v.* Somerset Justices	519
Rex *v.* Pickup	22 Cr. App. R. 186	*Dist.*	Rex *v.* Kritz	82
Rex *v.* Pagham Sewers Commissioners	8 B. & C. 355	*R.*	Marriage *v.* East Norfolk Rivers Catchment Board	284
Rex *v.* Secombe	12 Cr. App. R. 275		Rex *v.* Kritz	82
Rex *v.* Tonks	[1916] 1 K. B. 443	*R.*	Rex *v.* Thomas	26
Rex *v.* Trafford	1 B. & Ad. 874	*R.*	Marriage *v.* East Norfolk Rivers Catchment Board	284
Rex *v.* White	[1910] 2 K. B. 124	*R.*	Rex *v.* Thomas	26
Rhodes *v.* Airedale Drainage Commissioners	1 C. P. D. 380	*R.*	Marriage *v.* East Norfolk Rivers Catchment Board	284
Rhondda and Swansea Ry. Co. *v.* Talbot	[1897] 2 Ch. 131		Copps *v.* Payne	611
Richards *v.* Goskar	[1937] A. C. 304		Hales *v.* Bolton Leathers Ld.	493
Richardson *v.* Redpath, Brown & Co. Ld.	[1944] A. C. 62	*R.*	Schooley *v.* Nye	335
Rickards *v.* Forestal Land, Timber & Railways Co.	[1942] A. C. 50		Irvin *v.* Hine	555
Robert Addie & Sons (Collieries) Ld. *v.* Dumbreck	[1929] A. C. 358	*R.*	Williams *v.* Cardiff Corporation	514

Roberts *v.* Jones	[1947] K. B. 221	*Dist.*	Blackmill Ld. *v.* Straker	346
Robertson *v.* Minister of Pensions	[1949] 1 K. B. 227		E. P. Nelson & Co. *v.* Rolfe	139
Robertson *v.* Minister of Pensions	[1949] 1 K. B. 227		Solle *v.* Butcher	671
Robertson *v.* Petros M. Nomikos Ld.	[1939] A. C. 371	*R.*	Irvin *v.* Hine	555
Robinson *v.* Smith	[1915] 1 K. B. 711		Braddock *v.* Tillotson's Newspapers Ld.	47
Robson *v.* Headland	64 T. L. R. 596		Old Gate Estates Ld. *v.* Alexander	311
Roppel *v.* Bennett	[1949] 1 K. B. 115	*F.*	Lederer *v.* Parker	90
Rose *v.* Hurst	[1949] 2 K. B. 372	*C.*	Blackmill Ld. *v.* Straker	346
Roura and Forgas *v.* Townend	[1919] 1 K. B. 189		Irvin *v.* Hine	555
Rylands *v.* Fletcher	L. R. 1 Ex. 265 L. R. 3 H. L. 330	*R.*	Stone *v.* Bolton	201
Salisbury (Marquess) *v.* Gilmore	[1942] 2 K. B. 38	*F.*	Cunliffe *v.* Goodman	267
Salter *v.* Lask (No. 2)	[1925] 1 K. B. 584		Standingford *v.* Probert	377
Samuel, *In re*	[1945] Ch. 364	*C.*	Lamont, James, Ld. *v.* Hyland Ld.	585
Savoy Estates Ld., *In re*	[1949] Ch. 622	*Appl.*	Baxter *v.* Eckersley	480
Schintz *v.* Warr	[1926] Ch. 710		International Corporation Ld. *v.* Besser Manufacturing Co.	488
Scottish Greyhound Racing Co. *v.* Glasgow Assessor	1947 S. C. 380		Surrey County Valuation Committee *v.* Chessington Zoo Ld.	640
Seaford Court Estates Ld. *v.* Asher	[1949] 2 K. B. 481		Woodside House (Wimbledon) Ld. *v.* Hutchinson	182
Seaford Court Estates *v.* Asher	[1949] 2 K. B. 481	*C.*	Solle *v.* Butcher	671
Seddon *v.* North Eastern Salt Co.	[1905] 1 Ch. 326	*C.*	Solle *v.* Butcher	671
Sharpe *v.* Nichols	[1945] K. B. 382	*Dist.*	Harrison *v.* Hopkins	124
Shaw *v.* Kay	1 Exch. 412	*R.*	Colton *v.* Becollda Property Investments Ld.	216
Sheehan *v.* Cutler	[1946] K. B. 339	*R.*	Standingford *v.* Probert	377
Simper *v.* Coombs	[1948] W. N. 74		Morley's (Birmingham) Ld. *v.* Slater	506
Simper *v.* Coombs	64 T. L. R. 131		Solle *v.* Butcher	671
Simpson *v.* Charrington & Co. Ld.	[1934] 1 K. B. 64	*R.*	Schooley *v.* Nye	335
Sinclair *v.* Powell	[1922] 1 K. B. 393	*Appl.*	Mitchell *v.* Barnes	448
Singleton *v.* Williamson	7 H. & N. 410		Sorrell *v.* Paget	252

Siqueria *v.* Noronha .	[1934] A. C. 332	*R.*	Law *v.* Dearnley	400
		F.	Harrison *v.* Hopkins .	124
Skinner *v.* Geary . .	[1931] 2 K. B. 546	*R.*	Old Gate Estates Ld. *v.* Alexander . .	311
Skittrell *v.* Showell .	61 L. T. 874 .		Pacey *v.* Atkinson .	539
Slater *v.* Worthington Cash Stores (1930), Ld.	[1941] 1 K. B. 488		Stone *v.* Bolton .	201
Smith *v.* Cawdle Fen, etc., Commissioners	[1938] 4 All E. R. 61, 69		Marriage *v.* East Norfolk Rivers Catchment Board .	284
Smith *v.* Charles Baker & Sons	[1891] A. C. 325		Paris *v.* Stepney Borough Council . .	320
Smith *v.* Hughes . .	L. R. 6 Q. B. 597	*C.*	Solle *v.* Butcher.	671
		C.	Fred Long & Son Ld. *v.* Burgess	115
Smith *v.* Mather . .	[1948] 2 K. B. 212	*R.*	Baxter *v.* Eckersley .	480
		R.	Harrison *v.* Hopkins .	124
Snow *v.* Teed . .	L. R. 9 Eq. 622	*R.*	Standingford *v.* Probert .	377
Somes *v.* Sugrue . .	4 C. & P. 276.	*R.*	Irvin *v.* Hine .	555
Southgate Borough Council *v.* Watson . .	[1944] K. B. 541	*R.*	Minister of Agriculture and Fisheries *v.* Matthews .	148
Sowler *v.* Potter . .	[1940] 1 K. B. 271	*Q.*	Solle *v.* Butcher.	671
Spanish Prospecting Co., *In re*	[1911] 1 Ch. 92	*R.*	Surrey County Valuation Committee *v.* Chessington Zoo Ld. .	640
Stickney *v.* Keeble . .	[1915] A. C. 386	*Appl.*	Rickards, Charles Ld. v. Oppenhaim .	616
Stockham *v.* Easton .	[1924] 1 K. B. 52		Solle *v.* Butcher.	671
Stovell *v.* Jameson . .	[1940] 1 K. B. 92	*F.*	Zeidman *v.* Owen . .	593
Streat *v.* Cottey . .	14 L. J. N. C. C. R. 156	*Appr.*	Kestell *v.* Langmaid .	233
Suche, Joseph, & Co. Ld., *In re*	1 Ch. D. 48 .	*D.*	Hutchinson *v.* Jauncey .	574
Summers *v.* Donohue .	[1945] K. B. 376		Baxter *v.* Eckersley .	480
Swanson *v.* Forton . .	[1949] Ch. 143	*R.*	Moat *v.* Martin .	175
Swindon Corporation *v.* Pearce and Pugh	[1948] 2 K. B. 301		Pilling *v.* Abergele U.D.C. .	636
Tarry *v.* Ashton . .	1 Q. B. D. 314		Stone *v.* Bolton .	201
Tatam *v.* Reeve . .	[1893] 1 Q. B. 44	*R.*	Law *v.* Dearnley	400
Taylor *v.* Brown . .	9 L. J. (Ch.) 14		Rickards, Charles Ld. *v.* Oppenhaim .	616
Territorial and Auxiliary Forces Association of the County of London *v.* Nichols	[1949] 1 K. B. 35	*R.*	Tamlin *v.* Hannaford . .	18

Territorial Forces Association *v.* Philpot	[1947] 2 All E. R. 376	*R.*	Tamlin *v.* Hanaford . .	18
Thomas *v.* Thomas .	[1948] 2 K. B. 294	*R.*	Wheatley *v.* Wheatley .	39
Thomson *v.* Lord Clanmorris	[1900] 1 Ch. 718	*R.*	Cunliffe *v.* Goodman .	267
		R.	Zeidman *v.* Owen . .	593
Thorne *v.* Smith . .	[1947] K. B. 307	*R.*	Middleton *v.* Baldock (TW.)	657
Thynne *v.* Salmon . .	[1948] 1 K. B. 482	*C.*	Fred Long & Son Ld. *v.* Burgess	115
		R.	Baxter *v.* Eckersley .	480
		R.	Harrison *v.* Hopkins .	124
Tickner *v.* Clifton . .	[1929] 1 K. B. 207		Littlechild *v.* Holt . .	1
Torrance *v.* Bolton .	L. R. 8 Ch. 118	*R.*	Solle *v.* Butcher.	671
Trafford *v.* The King .	8 Bing. 204 .		Marriage *v.* East Norfolk Rivers Catchment Board .	284
Treloar *v.* Bigge . .	L. R. 9 Ex. 151	*R.*	Moat *v.* Martin .	175
Trickey *v.* Larne . .	6 M. & W. 278	*R.*	Lamont, James, & Co. Ld. *v.* Hyland Ld. .	585
Turner *v.* Baker . .	[1949] 1 K. B. 605	*Dist.*	Hutchinson *v.* Jauncey .	574
United Australia Ld. *v.* Barclays Bank Ld.	[1941] A. C. 1	*R.*	Baxter *v.* Eckersley .	480
Upsons Ld. *v.* Herne .	[1946] K. B. 591	*R.*	Mitchell *v.* Barnes . .	448
Vaughan *v.* Shaw . .	[1945] K. B. 400	*R.*	Solle *v.* Butcher.	671
Veale *v.* Cabezas . .	[1921] W. N. 311		Woozley *v.* Woodall Smith	325
Walsall Overseers *v.* London & North Western Ry. Co.	4 App. Cas. 30	*R.*	Rex *v.* Somerset Justices .	519
Ward *v.* Abraham . .	1910 S. C. 299	*R.*	Stone *v.* Bolton .	203
Waring *v.* Dewberry .	1 Stra. 97 .	*R.*	Fred Long & Son Ld. *v.* Burgess	115
Warwick *v.* Nairn . .	10 Ex. 762 .	*C.*	Lamont, James & Co. Ld. *v.* Hyland Ld. .	585
Watcham *v.* Att.-Gen. of East Africa Protectorate	[1919] A. C. 533	*R.*	Gaisberg *v.* Storr	107
Watkins *v.* Naval Colliery Co. Ld.	[1912] A. C. 693	*R.*	Harrison *v.* National Coal Board . .	466
Watson *v.* Cave . .	17 Ch. D. 23 .	*R.*	Lamont, James Ld. . *v.* Hyland Ld.	585
Waugh *v.* Morris . .	L. R. 8 Q. B. 202	*R.*	Edler *v.* Auerbach .	359
Weigall *v.* Westminster Hospital	52 T. L. R. 301	*R.*	Horton *v.* London Graving Dock Co. Ld. .	421

Welch *v.* Nagy	[1950] 1 K. B. 455	*Appl.*	Solle *v.* Butcher	671
Weld-Blundell *v.* Stephens	[1920] A. C. 956		Marriage *v.* East Norfolk Rivers Catchment Board	284
Wemyss *v.* Hopkins	L. R. 10 Q. B. 378		Rex *v.* Thomas	26
Westlake *v.* Page	[1926] 1 K. B. 298	*F.*	Kestell *v.* Langmaid	233
Wheatley *v.* Lambton, Helton and Joicey Collieries Ld.	[1937] 2 K. B. 426		Hales *v.* Bolton Leathers Ld.	493
Whiteman Smith Motor Co. Ld. *v.* Chaplin	[1934] 2 K. B. 35	*R.*	Schooley *v.* Nye	335
Wigsell *v.* School for Indigent Blind	8 Q. B. D. 357		James *v.* Hutton and J. Cook & Sons Ld.	9
Wilde *v.* Gibson	1 H. L. C. 605	*E.*	Solle *v.* Butcher	671
William Hill (Park Lane) Ld. *v.* Rose	[1948] 2 All E. R. 1107	*R.*	Law *v.* Dearnley	400
Williams *v.* Perry	[1924] 1 K. B. 936		Morley's (Birmingham) Ld. *v.* Slater	506
Wilson & Clyde Coal Co. Ld. *v.* English	[1938] A. C. 57		Paris *v.* Stepney Borough Council	311
Winchester Court Ld. *v.* Miller	[1944] K. B. 734		Woodside House (Wimbledon) Ld. *v.* Hutchinson	182
Woods Estate, *In re*	31 Ch. D. 607	*R.*	Tamlin *v.* Hannaford	181
Wright *v.* Hale	30 L. J. (Ex.) 40	*R.*	Hutchinson *v.* Jauncey	574
Wyburd *v.* Tuck	1 Bos. & P. 458		Colton *v.* Becollda Property Investments Ld.	221
Yelland *v.* Powell Duffryn Associated Collieries Co. Ld.	[1941] 1 K. B. 154	*C. & Dist.*	Harrison *v.* National Coal Board	467
Yeovil R.D.C. *v.* South Somerset and District Electricity Co. Ld.	[1948] 1 K. B. 130	*R.*	Surrey County Valuation Committee *v.* Chessington Zoo Ld.	640

STATUTES JUDICIALLY CONSIDERED

1541

uppression of Unlawful Games Act, 1541 (33 *Hen.* 8, *c.* 9), *s.* 14. COUGHTREY *v.* PORTER - **Divl. Ct. 629**

1824

agrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4. REX *v.* CLARKE - **C. C. A. 523**

1845

ailways Clauses Consolidation Act, 1845 (8 & 9 *Vict., c.* 20), *ss.* 47, 68 *and* 75. COPPS *v.* PAYNE - **C. A. 611**

aming Act, 1845 (8 & 9 *Vict., c.* 109), *ss.* 3, 8. COUGHTREY *v.* PORTER **Divl. Ct. 629**

1892

Gaming Act, 1892 (55 & 56 *Vict., c.* 9), *s.* 1. LOW *v.* DEARNLEY - **C. A. 400**

1906

Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 60; *s.* 69, *sub-s.* 3. IRVIN *v.* HINE - - **Devlin J. 555**

1911

Coal Mines Act, 1911 (1 & 2 *Geo.* 5, *c.* 50), *s.* 86. HARRISON *v.* NATIONAL COAL BOARD - - - **C. A. 466**

1914

Criminal Justice Administration Act, 1914 (4 & 5 *Geo.* 5, *c.* 58), *s.* 21. Coughtrey *v.* Porter **Divl. Ct. 629**

1916

Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 28, *sub-s.* 4. Rex *v.* Parkin **C. C. A. 155**

1920

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 3. Woodside House (Wimbledon) Ld. *v.* Hutchinson - - **C. A. 182**

—— —— *s.* 8. Minns *v.* Moore **C. A. 241**

—— —— *s.* 8, *sub-ss.* 1 *and* 3. Colton *v.* Becollda Property Investments Ld. - - - **C. A. 216**

—— —— *s.* 9, *sub-s.* 1. Lederer *v.* Parker **C. A. 90**

—— —— *s.* 12, *sub-s.* 1 (*a*) (*as amended by Rent and Mortgage Interest Restrictions Act*, 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 1; *sch. I*), *s.* 12, *sub-s.* 3. Mitchell *v.* Barnes **C. A. 448**

—— —— *s.* 12, *sub-ss.* 1 (*a*) *and* 7. Woozley *v.* Woodall Smith - **C. A. 325**

—— —— *s.* 12, *sub-s.* 1 (*f*). Harrison *v.* Hopkins - - **C. A. 124**
Lucas *v.* Lineham **C. A. 548**

—— —— *s.* 12, *sub-s.* 1 (*g*). Baxter *v.* Eckersley - - **C. A. 480**

1923

Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 9, *sub-s.* 1. Minns *v.* Moore **C. A. 241**

1925

Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 & 16 *Geo.* 5, *c.* 51), *s.* 1, *sub-s.* 4; *s.* 2, *sub-s.* 2. Wheatley *v.* Wheatley **Divl. Ct. 39**

Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *ss.* 1, 9, 43 *and sch. III.* Hales *v.* Bolton Leathers, Ld. - **C. A. 493**

1926

Housing (Rural Workers) Act, 1926 (16 & 17 *Geo.* 5, *c.* 56), *s.* 3. Blackmill Ld. *v.* Straker - - **C. A. 346**

1927

Agricultural Holdings Act, 1927 (13 & 14 *Geo.* 5, *c.* 9), *s.* 12. Kestell *v.* Langmaid - - **C. A. 233**

Finance Act, 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 55, *sub-s.* 6 (*b*). Attorney-General *v.* London Stadiums Ld. **Lord Goddard C.J. 72; C. A. 387**

Landlord and Tenant Act, 1927 (17 & 18 *Geo.* 5, *c.* 36), *ss.* 4, 5 *and* 21. Schooley *v.* Nye - **C. A. 335**

—— —— *s.* 18, *sub-s.* 1. Cunliffe *v.* Goodman - **Lord Goddard C.J. 267**

—— —— *s.* 19, *sub-s.* 2. James *v.* Hutton and J. Cook & Sons, Ld. **C. A. 9**

—— —— *s.* 19, *sub-s.* 1. Moat *v.* Martin **C. A. 175**

1930

Land Drainage Act, 1930 (20 & 21 *Geo.* 5, *c.* 44), *s.* 34, *sub-ss.* 1, 3; *s.* 38, *sub-s.* 1. Marriage *v.* East Norfolk Rivers Catchment Board - - - **C. A. 284**

Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 2, *sub-ss.* 1 (*b*) *and* (*d*), 4 (*b*), *s.* 18, *sub-ss.* 1 *and* 3. Keeble *v.* Miller - **Divl. Ct. 601**

1932

Solicitors Act, 1932 (22 & 23 *Geo.* 5, *c.* 37), *s.* 47, *sub-s.* 1. Pacey *v.* Atkinson **Divl. Ct. 539**

Rights of Way Act, 1932 (22 & 23 *Geo.* 5, *c.* 45), *s.* 1, *sub-s.* 1. Lewis *v.* Thomas - - - **C. A. 438**

1933

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3. Standingford *v.* Probert - - **C. A. 377**

—— —— *ss.* 3, 13, *and sch.* 1 (*h*). Littlechild *v.* Holt - **C. A. 1**

—— —— *sch.* 1 (*h*). Lucas *v.* Lineham **C. A. 548**

1934

County Courts Act, 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 90. Schooley *v.* Nye **C. A. 335**

Betting and Lotteries Act, 1934 (24 & 25 *Geo.* 5, *c.* 58), *s.* 3, *sub-s.* 2. Zeidman *v.* Owen - **Divl. Ct. 593**

1936

Public Health Act, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 49), *s.* 126. Border R.D.C. *v.* Roberts - **C. A. 716**

—— —— *s.* 269. Pilling *v.* Abergele U.D.C. - - **Divl. Ct. 636**

Housing Act, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 51), *s.* 9, *sub-ss.* 1, 3. Bacon *v.* Grimsby Corporation **C. A. 272**

1937

Firearms Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 12), *s.* 23, *sub-s.* 2. Rex *v.* Clarke - - - **C. C. A. 523**

ories Act, 1937 (1 *Ed.* 8 & 1 *Geo. c.* 67), *s.* 14, *sub-s.* 1; *s.* 16. Smith *v.* Morris Motors Ld. and Harris **Divl. Ct. 194**

1938

sing (*Rural Workers*) *Amendment Act*, 1938 (1 & 2 *Geo.* 6, *c.* 35), *s.* 4. Blackmill, Ld. *v.* Straker **C. A. 346**

1939

tation Act, 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 2, *sub-s.* 1; *s.* 3, *sub-s.* 1; *s.* 26. R. B. Policies at Lloyd's *v.* Butler - - **Streatfeild J. 76**

—— *s.* 21. Marriage *v.* East Norfolk Rivers Catchment Board **C. A. 284**

and Mortgage Interest Restrictions Act, 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3 *and sch. I.* Colton *v.* Becollda Property Investments Ld. **C. A. 216**

—— *s.* 3, *sub-s.* 2 (*c*). Blackmill Ld. *v.* Straker - - **C. A. 346**

—— *sch. I.* Woozley *v.* Woodall Smith - - - **C. A. 325**

pensation (*Defence*) *Act*, 1939 (2 & 3 *Geo.* 6, *c.* 75), *ss.* 1, 2, 3, *sub-ss.* 3, 8. J. Lyons & Co., Ld. *v.* Home Secretary - - **Divl. Ct. 531**

1941

itors Act, 1941 (4 & 5 *Geo.* 6, *c.* 46), *sch. III.* Pacey *v.* Atkinson **Divl. Ct. 539**

1944

al Water Supplies and Sewerage Act, 1944 (7 & 8 *Geo.* 6, *c.* 26), *s.* 6. Border R.D.C. *v.* Roberts **C. A. 716**

1945

Building Materials and Housing Act, 1945 (9 & 10 *Geo.* 6, *c.* 20), *s.* 7, *sub-s.* 1. Johnson *v.* Youden **Divl. Ct. 544**

Water Act, 1945 (8 & 9 *Geo.* 6, *c.* 42), *s.* 40. Border R.D.C. *v.* Roberts **C. A. 716**

1946

National Insurance (*Industrial Injuries*) *Act*, 1946 (9 & 10 *Geo.* 6, *c.* 62), *ss.* 1, 55 *and* 89, *sub-s.* 1, *proviso* (*a*). Hales *v.* Bolton Leathers, Ld. **C. A. 493**

1948

Requisitioned Land and War Works Act, 1948 (11 & 12 *Geo.* 6, *c.* 17), *s.* 11, *sub-s.* 2. J. Lyons & Co., Ld. *v.* Home Secretary - - **Divl. Ct. 531**

Local Government Act, 1948 (11 & 12 *Geo.* 6, *c.* 26), *s.* 85, *sub-s.* 1, *and* 89, *sub-s.* 5 (*b*). The King *v.* St. Pancras Borough Assessment Committee. *Ex parte* The Railway Executive - **C. A. 58**

Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 21, 22, 23. Rex *v.* Dickson - - - **C. C. A. 394**

Agricultural Holdings Act, 1948 (11 & 12 *Geo.* 6, *c.* 63), *s.* 2, *sub-ss.* 1 *and* 2. Goldsack *v.* Shore **C. A. 708**

1949

Landlord and Tenant (*Rent Control*) *Act*, 1949 (12 & 13 *Geo.* 6, *c.* 40), *ss.* 9 *and* 10. Hutchinson *v.* Jauncey **C. A. 574**

RULES AND ORDERS JUDICIALLY CONSIDERED

S. C., 1883, *Or.* 11, *r.* 1 (*e*). International Corpn. Ld. *v.* Besser Manufacturing Co. **C. A. 488**

Or. 14. James Lamont & Co., Ld. *v.* Hyland, Ld. - - **C. A. 585**

Or. 25, *r.* 4. Law *v.* Dearnley **C. A. 400**

Or. 58, *r.* 4. Braddock *v.* Tillotson's Newspapers Ld. **C. A. 47**

—— *r.* 8. James Lamont & Co., Ld. *v.* Hyland, Ld. - **C. A. 585**

nty Court Rules, 1936, *Or.* 10, *r.* 2 (*g*). Schooley *v.* Nye - **C. A. 335**

Or. 40 (*Landlord and Tenant Act*, 1927), *r.* 5. Schooley *v.* Nye **C. A. 335**

nce (*General*) *Regulations*, 1939 (*St. R. & O. No.* 927), *reg.* 51 (1) (2). Minister of Agriculture and Fisheries *v.* Matthews - **Cassels J. 148**

—— —— *reg.* 62, *para.* 4A. Kestell *v.* Langmaid - - **C. A. 233**

—— —— *reg.* 68 CA (1). Edler *v.* Auerbach - - **Devlin J. 359**

Explosives in Coal Mines Order, 1934, *made under s.* 61 *of the Act of* 1911 (*St. R. & O.* 1934, *No.* 6), *arts.* 2 (*e*) *and* 6 (*a*). Harrison *v.* National Coal Board - - **C. A. 466**

General Regulations, 1913, *made under the Coal Mines Act*, 1911 (*St. R. & O.* 1913, *No.* 748), *reg.* 1. Harrison *v.* National Coal Board **C. A. 466**

Goods Vehicles (*Keeping of Records*) *Regulations*, 1935 (*St. R. & O.* 1935, *No.* 314), *reg.* 6. Manley *v.* Dabson - - **Divl. Ct. 100**

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

Explained and Applied. LUCAS *v.* LINEHAM. [1950] 1 All E.R. 586.

Explained and applied. LUCAS *v.* LINEHAM [1950] 1 K. B. 548

LITTLECHILD *v.* HOLT.

C. A.

1949
Mar. 31 :
Apr. 1.

Lord Goddard C.J.,
Denning L.J.
Birkett J.

Landlord and Tenant—Rent restriction—Recovery of possession of house without offer of alternative accommodation—Purchase of dwelling-house occupied by statutory tenant in 1944*—Purchasing landlord sues in* 1948 *for possession on ground requires house as residence for himself—Defendant, tenant by virtue of s.* 12, *sub-s.* 1 *(g), of Act of* 1920*—Landlord dies whilst case part heard—Action continued by widow as administratrix and in her own right—Widow in no better position than her husband—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *ss.* 3, 13, *and sch.* 1 *(h).*

L. purchased a dwelling-house, subject to the Rent Restriction Acts, on March 9, 1944, then in the occupation of M., a statutory tenant and, thereby, owing to the provision in s. 3 of and sch. 1 (*h*) to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, became debarred from claiming recovery of possession of the dwelling-house for occupation as a residence for himself, without proof of suitable alternative accommodation, since he had purchased the dwelling-house since December 6, 1937 (and if a new control house, September 1, 1939). L., brought an action claiming recovery of possession of the dwelling-house against the defendant, a daughter of M., tenant by virtue of s. 12, sub-s. 1 (*g*), of the Act of 1920, but the plaintiff died before judgment was delivered. L.'s widow, having obtained letters of administration to her husband's estate was enabled by order to continue the action.

C. A.

1949

LITTLECHILD
v.
HOLT.

Held, that the widow, although she herself had never purchased the house, was in no better position as a plaintiff than that occupied by her husband, either in her own right, as her husband's universal legatee and devisee, or as the administratrix of her husband's estate. Accordingly, she also was debarred from claiming recovery of possession of the dwelling-house, without proof of suitable alternative accommodation. The protection was not lost by M.'s daughter succeeding to the statutory tenancy by virtue of para. (*g*) of sub-s. 1 of s. 12 of the Act of 1920.

Baker v. *Lewis* [1947] K. B. 186, and *Fowle* v. *Bell* [1947] K. B. 242, distinguished.

APPEAL from Guildford county court.

E. E. Littlechild, an elderly man about to retire, bought a dwelling-house on March 9, 1944. At the date of purchase a tenant, Mills, was in occupation of the house as a statutory tenant. Mills' daughter, a Mrs. Holt, had been living with him for more than six months as a member of his family before March 17, 1945, on which date Mills died. Mrs. Holt continued to occupy the premises and she paid rent to Littlechild. On May 26, 1948, Mrs. Holt received due notice to quit, expiring on June 6, 1948. She remained in occupation claiming the protection of the Rent Restriction Acts. The landlord, Littlechild, sued for possession on June 8, 1948, on the ground that the house was reasonably required for occupation as a residence for himself and the case was partly heard on July 1 and adjourned to July 22. On July 21 Littlechild died and the case was stood over for his widow to take out letters of administration. On October 4, an order substituting Mrs. Littlechild as plaintiff was made and the hearing of the case was resumed on November 15, when Mrs. Littlechild claimed and was allowed to sue both as administratrix of her late husband and in her own right.

The county court judge held that Mrs. Littlechild had not purchased the house since December 6, 1937, that the balance of hardship lay with the plaintiff and made an order for possession.

The tenant, Mrs. Holt, appealed.

Niall MacDermott for the defendant. The dwelling-house was in the occupation of Mr. Mills as a statutory tenant on March 9, 1944, when Mr. Littlechild bought it. Mrs. Holt, his daughter, was residing with Mr. Mills at the time of his death on March 17, 1945, and had been living with him for more than six months as a member of his family before that date. Therefore by reason of s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, at his death and thenceforward Mrs. Holt became a statutory tenant of the dwelling-house and was protected in her tenancy by the Rent Restriction Acts, as was her father Mr. Mills. The object of the provision in para. (*h*) of sch. 1 to the Act of 1933 excepting a landlord who has purchased the dwelling-house or an interest therein after December, 1937 (or in the case of new control houses after September 1, 1939), from claiming recovery of possession of the house for occupation as a residence for himself was to protect a sitting tenant from having his house bought over his head. Paragraph (*h*) does not protect the tenant to whom such a landlord himself has subsequently let the house: *Epps* v. *Rothnie* (1) and *Fowle and Wife* v. *Bell and Wife* (2). Mrs. Holt by reason of s. 12, sub-s. 1 (*g*) of the Act of 1920, as amended, stood in the shoes of her father, as the sitting tenant and was similarly protected.

Turning to the position of the landlord Mrs. Littlechild could only sue as the administratrix of her husband's estate; she could not sue at the same time in her own right, and Mrs. Littlechild, whether she sued as administratrix of her husband or as his universal legatee and devisee, could not have any better right in the dwelling-house than that possessed by her late husband. His rights are her rights. It is true that she did not purchase the dwelling-house after December 6, 1937, and on that ground the county court judge has made this order for the recovery of possession. But she had no rights other than those of her late husband and is subject to the same disability as he was under by virtue of para. (*h*) of sch. 1 to the Act of 1933. The word "purchasing" in para. (*h*) has the ordinary meaning of "buying:" *Baker* v. *Lewis* (3) and *Powell* v. *Cleland* (4). It cannot be that Mrs. Holt was protected under the Rent Restriction Acts whilst Mr. Littlechild was alive, but that by his death she forthwith became unprotected. See s. 12, sub-s. 1 (*f*) of the Act of 1920 by which the expression "landlord" and "tenant" includes any person deriving title under the original landlord or tenant respectively. The tenancy is what is protected whether it is a contractual tenancy which has since the purchase become a statutory tenancy or whether it has been a statutory tenancy, as here, from the time of the purchase and thenceforward.

(1) [1945] K. B. 562.
(2) [1947] K. B. 242.
(3) [1947] K. B. 186.
(4) [1948] 1 K. B. 262.

Wallis-Jones for the plaintiff. The word "landlord" in para (*h*) of sch. 1 to the Act of 1933 implies the existence of a tenant—not being a landlord who has become landlord "by purchasing" the dwelling-house. The tenant referred to is the sitting tenant at the time of the purchase. See the judgment of Evershed L.J. in *Powell* v. *Cleland* (1). Scott L.J. in *Epps* v. *Rothnie* (2) expressed the view that the object of the exception in para. (*h*) was to protect a sitting tenant from having his home bought over his head. See also the judgment of Somervell L.J. in *Fowle* v. *Bell* (3). Compare the judgment of Scott L.J. in *Bolsover Colliery Co., Ld. v. Abbott* (4) on para. (*g*) (1.) of sch. 1. to the Act of 1933. In this case the plaintiff is not the landlord of the present sitting tenant. Neither has she purchased the dwelling-house. Littlechild was within the exception in para. (*h*) as against Mills, but not as regards Mills' daughter, Mrs. Holt, whose tenancy was a separate tenancy. See *Tickner* v. *Clifton* (5).

Niall Macdermott replied.

LORD GODDARD C.J. The first point taken for the tenant was that the plaintiff ought not to have been allowed to sue in her own right, and that she could only exercise in the action the rights and stand in the shoes of her deceased husband. In my opinion that point is not sound. A claim by an executor or administrator, as executor or administrator against a defendant can be joined with a claim by the executor or administrator personally on his own cause of action, if the personal claim is alleged to arise with reference to the estate in respect of which the plaintiff sues as executor or administrator. See County Court Rules, 1936, Or. 4, r. 1 (*b*). I think therefore, that it was open to the judge in this case to allow Mrs. Littlechild to pursue the action both in her capacity as administratrix of her husband and in her own right.

The first question that arises is whether or not Mrs. Holt was in the position of a protected person holding over after her father's death, that is whether she was a "tenant" within the meaning of s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. By that provision the expression "tenant" includes, where a tenant leaves no

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(1) [1948] 1 K. B. 262, 270.
(2) [1945] K. B. 562, 565.
(3) [1947] K. B. 242, 249.
(4) [1946] K. B. 8, 12.
(5) [1929] 1 K. B. 207.

C. A.
1949
LITTLECHILD
v.
HOLT.
Lord Goddard C.J.

widow or is a woman, such member of the tenant's family who was residing with him at the time of his death and (by s. 13 of the Act of 1933) for not less than six months before the death, as may be decided, in default of agreement, by the county court. The Acts of 1920 and 1933 must be read together and we must take it that the judge has found that Mrs. Holt was such a tenant.

The next question is whether the plaintiff either as the universal legatee and devisee of her husband or as the administratrix of her husband is in a position to obtain an order for possession. By s. 3 of, and sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, a court shall for the purposes of s. 3 of this Act have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if (*h*) " the dwelling-house is reasonably " required by the landlord (not being a landlord who has " become landlord by purchasing the dwelling-house or any " interest therein "—after December 6, 1937, or in the case of new control houses, September 1, 1939,—" for occupa- " tion as a residence for himself,") or certain other persons. When the action was launched by Mr. Littlechild he admittedly was a landlord who had become landlord by the purchasing of the dwelling-house after December 6, 1937, and he would not, therefore, have been able himself to obtain an order for possession. The question then arises—and this is the point on which this court disagrees with the county court judge—whether Mrs. Littlechild is in a better position than her husband would have been. It certainly would be a very remarkable hiatus in the Act if she were. This provision that a landlord who has become landlord by purchasing the house after December 6, 1937, cannot obtain an order for the recovery of possession of a dwelling-house without proof of suitable alternative accommodation was inserted in the Act for the protection of the tenant. The " tenant " is, of course, a convenient expression, but it is the expression used all the way through the Acts as meaning the person who is holding the property. It would certainly be somewhat remarkable if the tenant were protected against a landlord, who himself had sought to recover possession of the house, but was not protected because the landlord had died and his interest had passed over on an intestacy or by will to his wife or to some other person. The sitting tenant admittedly has that protection as long as the person who bought the property since December 6, 1937, remains the landlord of the property, but the moment he has disposed of his interest in the property otherwise than by sale, it is said that the new landlord has this right. which the former landlord had not got. Two cases have been cited to us: *Baker* v. *Lewis* (1) and *Fowle* v. *Bell* (2) which decided that a person who takes by will is not a person who has purchased the house within the meaning of paragraph (*h*) of sch. 1 to the Act of 1933. The Court of Appeal decided in those cases, I think, that " purchase " meant " buying," that it had not got the old conveyancing technical meaning which used to be, and is still, given for certain purposes to the expression " purchase " in relation to real property. But these two cases are distinguishable from the present case in this most important fact. The persons who succeeded to the property by will in those cases took the property from a person whose title had not the clog upon it (if I may use that expression) that was on Mr. Littlechild's title in this case. For instance, in *Baker* v. *Lewis* (1) the plaintiff had acquired the property by will from some testator who had left it to her by will. There is nothing in the report to show that the testator was a person who himself would not have been able to apply for possession of the house, without proof of suitable alternative accommodation, by reason of the fact that he had bought the house since this particular date. He was a man who probably had owned the house very many years. He had left the house to Mrs. Baker, and she therefore did not acquire the house by purchase, and therefore she was in a position to exercise the same rights as those of her testator, that is to apply for possession, if she could show greater hardship than would be caused to the tenant. That also was the case in *Fowle* v. *Bell* (2). But in this case, the landlord from whom Mrs. Littlechild acquired title was in the position that his title was, as I have already said, clogged: he could not apply for an order for possession because of this provision in para. (*h*) of sch. 1. to the Act of 1933.

When we look at the Act of 1920, we find that by s. 12, sub-s. 1 (*f*), of that Act the expressions " landlord," " tenant," " mortgagee," and " mortgagor " include any person from time to time deriving title under the original landlord, tenant, mortgagee, or mortgagor. That seems to me clearly to indicate that a person who acquires property from a landlord cannot have a better right with regard to obtaining an order for possession than that which the landlord had from whom he acquired the property. As, in this case, the original landlord, Mr. Littlechild, would have come exactly within the words in brackets in para. (*h*) of sch. 1 to the Act of 1933, " not being a landlord who has become landlord by purchasing " the dwelling-house or any interest therein after the 6th day " of December, 1937," and so would have been debarred by those words from ever applying for an order for possession without proof of suitable alternative accommodation, so long as this Act is in force, it follows that Mrs. Littlechild also was debarred from applying for possession without proof of suitable alternative accommodation, and, although she could show greater hardship than that which would have fallen on the tenant if an order were made, she is, I am afraid, debarred from exercising the right to obtain possession. For these reasons, I think the appeal must be allowed.

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(1) [1947] K. B. 186.

(2) [1947] K. B. 242.

DENNING L.J. Landlords of houses within the Rent Acts are subject to many restrictions. They cannot, as a rule, recover possession without showing that suitable alternative accommodation is available for the tenant. But if a landlord reasonably requires a house for his own occupation he may in certain circumstances be relieved of the obligation to show suitable alternative accommodation. But that does not apply to landlords who have become landlords by purchasing the house since December 6, 1937. The intention of the legislature was that people should not be able to buy houses over the heads of the tenants and then turn them out without giving them alternative accommodation. The question in this case is whether the landlord is under that disability.

In order that a landlord should be under the disability, three requisites are necessary: first, there must have been a " purchase " of the dwelling-house or an interest therein since December 6, 1937. The acquisition of the reversion, whether it be a freehold or a leasehold, for money or money's worth, and whether payable in a lump sum or by instalments, is plainly a " purchase." But the acquisition of it under a will is not a purchase: *Baker* v. *Lewis* (1). Nor, strangely

(1) [1947] K. B. 186.

C. A.

1949

LITTLECHILD
v.
HOLT.

Denning L.J.

enough, is the acquisition of the reversion in the shape of a new lease at a rack rent: *Powell* v. *Cleland* (1).

Secondly, there must have been a contractual or statutory tenancy in existence at the time of the purchase which is still in existence today. But there need not be the same tenant there. It is the tenancy which is protected, whether it is a contractual tenancy which, since the purchase, has become a statutory tenancy, or whether it has been a statutory tenancy all the time. The protection is not lost by a contractual tenant assigning his interest to another, or by a member of the tenant's family succeeding to a statutory tenancy. But it is lost when the tenancy expires and a new one is voluntarily created: *Epps* v. *Rothnie* (2), and *Fowle* v. *Bell* (3).

Thirdly, the purchase must have been by the present landlord or his predecessor in title. The disability affects not only the purchaser himself but also his successors in title: see s. 12, sub-s. 1 (*f*), of the Act of 1920. So long as the tenancy continues in existence, the landlord and his successors to the reversion on the tenancy come under the disability.

In this case, these three requisites are fulfilled. The house was purchased by Mr. Littlechild in 1944. There was then a statutory tenancy in existence in the hands of Mr. Mills. That tenancy is still in existence today in the hands of his daughter Mrs. Holt, who, as a member of his family, succeeded to the tenancy. Mr. Littlechild was therefore subject to the disability, and his wife, as his successor, is in no better position than he. Therefore, the disability applies, and the landlord cannot recover possession without giving alternative accommodation. I agree that the appeal should be allowed.

BIRKETT J. I agree, and I have only one word to add. I think the decision of the court which has just been announced is in accordance with the whole purpose of these rather complicated Acts of Parliament. My Lord, in his judgment, stated clearly the position of Mrs. Holt, and came to the conclusion, both on the construction of the Acts of Parliament and on the findings of the county court judge, that she was in a position to be protected; she was a protected tenant. If that be so, it seems to me that the simple question in this case is whether Mrs. Littlechild had the right or power to

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(1) [1948] 1 K. B. 262.

(2) [1945] K. B. 562.

(3) [1947] K. B. 242.

C. A.
1949
LITTLECHILD
v.
HOLT.
Birkett J.

overcome the protection which the tenant had. It is clear that Mr. Littlechild would have had no power against the original tenant, Mr. Mills, and none, I think, against Mrs. Holt, and the simple question seems to be: Is Mrs. Littlechild in any better position? The county court judge has decided this issue, I think, upon the literal interpretation of the words. He uses the words literally, and he has said that in this case Mrs. Littlechild did not purchase the property, and then, looking at the wording of the section, that she has therefore not become landlord by purchasing the dwelling-house, and, taking the purely literal meaning of the words, he has come to the conclusion that the provision—the "clog," as my Lord termed it—which certainly created a disability in the case of Mr. Littlechild was removed in the case of Mrs. Littlechild. I do not think so. It is plain that her position depended entirely on the fact that she had succeeded her husband, and I cannot think that she was therefore in any better position than he was.

In my opinion, the judgments delivered are correct and afford the proper interpretation of sch. 1 (*h*) to the Act of 1933, and with them both I agree.

Appeal allowed.

Solicitors for the tenant: *Vizard, Oldham, Crowder and Cash, for Mellersh and Lovelace, Godalming.*

Solicitors for the landlord: *Potter, Crundwell and Bridge, Guildford.*

C. G. M.

JAMES *v.* HUTTON AND J. COOK & SONS LD.

SAME *v.* SAME.

Followed. SMILEY *v.* TOWNSHEND [1950] 2 K. B. 311

C. A.
1949
June 16, 17, 29.
Lord Goddard C. J., Tucker and Singleton L.JJ.

Landlord and tenant—Lease—Licence to substitute new shop front—Covenant to reinstate at expiration or earlier determination of lease—Breach of that covenant—No evidence of damage from breach—Measure of damages—Not the cost of reinstatement but the actual, it might be, merely nominal, damage—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 19, *sub-s.* 2.

Where a lessee has under licence made an alteration to the building let and has covenanted in the licence, on request, to restore the building to its original condition at the expiration or sooner determination of the lease, the measure of damages at common law applicable to a breach of the covenant to restore, when the only evidence is that there has been no compliance with the request, is that of the general rule as to damages for breach of contract—the amount of the damage actually suffered and not the cost of the restoration.

A lessee of large premises took advantage of a licence, granted by his lessor, to take down the shop front of the premises and to erect a new one. The licence contained a covenant by the lessee, at the expiration or sooner determination of the lease, if so required, to restore the premises to the same state as they were in before the licence was granted. At the determination of the lease, the lessee failed, when so required, to restore the old shop front and to reinstate the premises as they were before the licence was granted. In an action by the lessor against the lessee claiming damages for breach of the covenant in the licence to restore the premises to their original condition, there was no evidence that such restoration would make the premises suitable for any particular purpose or business or that the premises were in any way adversely affected or made less valuable by reason of the substitution of a new and modern shop front for an old one.

Held, that the measure of damage, at common law, applicable to the breach of covenant to restore the premises, on request, to the condition in which they were before the licence was granted, was that applicable in contract for the damage actually suffered, which in this case was merely nominal.

There was no analogy between this case and that of a breach of covenant to deliver up premises in repair, where the measure of damage at common law was the amount which the landlord proved to be fully and reasonably necessary in order to put the premises into that state of repair to which he was entitled. See *Morgan* v. *Hardy* (1886) 17 Q. B. D. 770, affirmed on this point in the Court of Appeal as reported in 35 W. R. 588 (but reversed by the Court of Appeal and the House of Lords on another point (1887) 18 Q. B. D. 646 and sub-nom. *Hardy* v. *Fothergill* (1888) 13 App. Cas. 351) and *Joyner* v. *Weeks* [1891] 2 Q. B. 31.

Although the tribunal of trial, an official referee, thought that there was no provision of the Landlord and Tenant Act, 1927, applicable to the case, the Court intimated that it might be that s. 19, sub-s. 2, was so applicable; but it was unnecessary to give a decision on that issue.

APPEAL by the defendants and cross-appeal by the plaintiff, from a decision of His Honour J. G. Trapnell, official referee, in an action claiming damages for breach of repairing covenants and for breach of a covenant to restore premises to their former condition.

By a lease dated December 12, 1934, the plaintiff demised to the first defendant the James Store in Carrington Street, Nottingham, for 21 years at an annual rent of 1,250*l.* for the first seven years and 1,500*l.* thereafter. The lease contained a full repairing covenant and also a covenant that the lessee would not during the term make or permit to be made any substantial addition, deviation or alteration to or in the demised premises without the consent and approval of the plaintiff and her superior landlords; and would submit plans, elevations, etc., of any proposed addition or alteration for approval by her and the superior landlords. On December 13, 1934, the plaintiff granted to the first defendant a licence for the alteration of the existing shop front and the erection of one which differed very materially from that which was in existence at the date of the demise. That licence contained a provision that at the expiration or sooner determination of the lease the lessee would reimburse the plaintiff the cost of the reinstatement and the making good by her of the demised premises, including the cost of removing the additions and alterations made by virtue of the licence, and of restoring the premises to the same state as they were then in and as if the several works and alterations authorized had not been made, provided that the liability of the lessee should not be greater than the cost of the reinstatement actually carried out by the lessor. The first defendant did not carry out any work under the licence and on May 29, 1936, the lease was assigned by him to the second defendants, the company.

On August 14, 1936 (by a deed which was expressed to be supplemental to the licence of December 13, 1934) the plaintiff granted a licence to the company to execute certain alterations and works which were of the same description, viz., the erection of a new shop front. That licence contained a covenant by the lessee at the expiration or sooner determination of the lease (if so required) to restore the premises to the same state as they were in before the said alterations and works had been executed by the company, or, at the option of the plaintiff, to the same state as they were in before the principal licence was granted and as if the several works and alterations thereby or by the principal licence authorized had not been made. The second licence was expressed to be in addition to but not in substitution for the principal licence, the covenants and conditions of which were to remain in full force and effect.

The works were carried out by the company at a cost of about 3,300*l.*, the work being finished in February, 1940.

C. A.

1949

James
v.
Hutton
and
J. Cook
& Sons Ld.
Same
v.
Same.

On May 27, 1940, notice was given by the company to determine the lease on March 25, 1941, but on June 20, 1940, the premises were requisitioned by the War Department and had ever since remained in the occupation of one government department or another. In March, 1941, the plaintiff started proceedings, claiming damages for breach of the repairing covenant in the lease and for a declaration that the lease could not be determined by the lessee because the premises had not been put into a proper state of repair. That action was settled on terms, one of which was that the lease should continue in existence until September 29, 1945. At that date a government department was still in occupation of the premises and paying compensation at the rate of 1,100*l.* a year. There had been negotiations for some time with regard to a lease being granted to the Ministry, but no agreement had been concluded.

On June 12, 1946, notice was given by the plaintiff to the company that in exercise of the option contained in the second licence she required them to restore the premises to the same state as they were in before the principal licence had been granted and as if the works and alterations authorized by both licences had not been made. There was no suggestion that the plaintiff had been required by her superior landlords to reinstate the premises.

On October 15, 1947, the writ in this action was issued claiming damages for breach of the repairing covenants and for breach of the covenant to restore the premises to their former condition, and the action was referred to His Honour J. G. Trapnell, official referee, who, on this issue, had only to consider the provision for restoration contained in the second licence. The obligations imposed by the two licences differed and it was not argued that for this purpose the two licences would have to be read together. On the issue of the true measure of damage which the plaintiff could recover for the failure by the defendants to restore the premises to their original condition the referee said that he would apply the rule which prevailed before the date of the Landlord and Tenant Act, 1927, as to the measure of damages recoverable for breach of a repairing covenant and awarded the plaintiff some 4,300*l.*, which he estimated was the probable cost of doing the work of restoration. It appeared that he fixed that sum as being the price at which the work could be done to-day, with some deduction on account of the fact that the work could not in any case be carried out for a considerable time, the Ministry being still in possession of the premises. He said that in his view there were no provisions of the Landlord and Tenant Act, 1927, applicable to the case and that the measure of damage he applied was that at common law.

The defendants appealed, and the plaintiff cross-appealed.

Arthur Ward K.C. and *Ryder Richardson* for the defendants. The learned official referee has applied the wrong measure of damage. The proper measure is the damage to the reversion which, here, was merely nominal. The plaintiff here obtained a new shop front and there was no suggestion that the plaintiff proposed to spend what she received from the defendant by substituting the old shop front: the damages received would be simply so much surplus cash received by the plaintiff together with her modern shop front. The measure of damages for failure to erect a building is the diminished value of the premises in consequence of the failure, not the cost of erecting it: *Wigsell* v. *School for Indigent Blind* (1). It is not contended that the possession of the premises by a government department affords any defence to the defendants: *Matthey* v. *Curling* (2).

Mitchison K.C. and *Morgan Blake* for the plaintiff. The breach of covenant alleged was the failure to reinstate the premises in their former condition and the measure of damage applicable is the cost to the plaintiff of that reinstatement. The measure of damages for breach of a covenant by a lessee to deliver up demised premises in repair is the cost of putting them into the state of repair required by the covenant: *Morgan* v. *Hardy* (3) and *Joyner* v. *Weeks* (4). The case of *Wigsell* v. *School for Indigent Blind* (1) was mentioned in the argument in *Joyner* v. *Weeks* (4).

[LORD GODDARD C.J. Was not the object of the covenant to protect the lessor from any damage she might suffer from the alteration of the shop front?]

The purpose was that the lessor could have her old shop front restored, should she prefer it and that means to have the funds to restore it. There is no essential difference between a covenant to deliver up demised premises in a state of repair

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(1) (1882) 8 Q. B. D. 357.

(2) [1922] 2 A. C. 180.

(3) (1886) 17 Q. B. D. 770, affirmed on this point (1887) 35 W. R. 588.

(4) [1891] 2 Q. B. 31.

C. A.
1949
JAMES v. HUTTON AND J. COOK & SONS LD.
SAME v. SAME.

and a covenant not to alter such premises. The plaintiff is entitled to be placed in the same position as if there had been no breach of covenant—not in as good a position, but in the same position. The plaintiff here is damnified by being forced to accept a shop front other than the one she has covenanted she should have. Even if the substituted shop front were a larger and better shop front than the one it displaced, that is immaterial. The plaintiff is entitled to secure the shop front for which she stipulated. The defendant has no right to substitute something else for that which he agreed to provide. See the judgment of Pollock C.B. in *Legh* v. *Lillie* (1).

The official referee said that in his view there were no provisions of the Landlord and Tenant Act, 1927, applicable to that case. There is no definition as to what is an "improvement" within the meaning of s. 19, sub-s. 2, of the Landlord and Tenant Act, 1927 (2). The requirement to reinstate the old shop front was reasonable. [*Eyre* v. *Johnson* (3) and *Eyre and Another* v. *Rea* (4) were mentioned.]

Cur. adv. vult.

June 29. LORD GODDARD C.J. read the following judgment of the court: It is quite obvious from the judgment of the official referee, and, indeed, it could not seriously be disputed, considering that the government is still in occupation of the premises, that, in his opinion, the plaintiff will not herself restore these premises and there is not the slightest likelihood of the shop-front ever being replaced. In other words, if the plaintiff obtains this sum as damages she will be enabled to put it into her pocket. He came to the conclusion that there were no provisions in the Landlord and Tenant Act, 1927, applying to this case, and that, therefore, the plaintiff was entitled to recover damages at common law. If she is, no doubt it is no concern of the court as to what she will do with the money when she gets it, and the first question we have to consider is whether the measure of damage is the cost of doing the work, assuming it can be done. Mr. Ward for the defendants did not argue that the fact that the government were in occupation at the present time would afford any defence, considering, no doubt rightly, that he was precluded from setting up that contention by the decision of the House of Lords in *Matthey* v. *Curling* (1). Although the matter is not quite clear, we think the learned referee has fixed the sum as the price at which the work could be done today, with some deduction, because of the fact that the work cannot in any case be carried out for a very considerable time.

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(1) (1860) 6 H. & N. 165, 169.

(2) The Landlord and Tenant Act, 1927, s. 19, sub-s. 2: "In "all leases whether made before "or after the commencement of "this Act containing a covenant, "condition or agreement against "the making of improvements "without licence or consent, such "covenant, condition or agree"ment shall be deemed, notwith"standing any express provision "to the contrary, to be subject to "a proviso that such licence or "consent is not to be unreason"ably withheld; but this proviso "does not preclude the right to "require as a condition of such "licence or consent the payment "of a reasonable sum in respect of "any damage to or diminution in "the value of the premises or any "neighbouring premises belonging "to the landlord, and of any legal "or other expenses as properly "incurred in connection with "such licence or consent nor, in "the case of an improvement "which does not add to the let"ting value of the holding, does it "preclude the right to require as "a condition of such licence or "consent, where such a require"ment would be reasonable, an "undertaking on the part of the "tenant to reinstate the premises "in the condition in which they "were before the improvement "was executed."

(3) [1946] K. B. 481.

(4) [1947] K. B. 567.

In our opinion, the case has to be considered without regard to the fact that a ministry is at present in possession of the premises. If we eliminate that fact, the position would be, so far as the shop front is concerned, that the lessor would receive back her premises from the defendants with a new and modern shop front. Although evidence was, no doubt, given that some persons might prefer the old shop front as it was, no evidence was given either by or on behalf of the plaintiff that she had any reason whatever for desiring an alteration of the present shop front or that restoration of the old one would make the premises more suitable for any particular purpose or business that she might wish to carry on there, or that the premises were in any way adversely affected or made less valuable by reason of the alteration to the shop front. True there was some evidence that there had been a reduction in the rateable value, but it cannot be taken that this was due to the alterations which had been carried out. What, then, is the measure of damage applicable to the breach of a covenant to restore on request when the only evidence is that there has been no compliance with that

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(1) [1922] 2 A. C. 180.

C. A.

1949

James
v.
Hutton
and
J. Cook
& Sons Ld.

Same
v.
Same.

request? In our opinion, the general rule as to damages for breach of contract ought to be applied, namely, to ascertain what is the amount of the damage actually suffered. A covenant is only a special form of contract and the same rules apply to a breach of covenant as apply to a breach of a simple contract so far as damages are concerned.

To apply the rule as to the measure of damage for a breach of contract to deliver up a house in repair to this case is, in our opinion, wrong, for there is no true analogy between the two cases. If a tenant fails to deliver up a house in repair, the landlord must suffer some damage, at least so long as the house remains in existence. Instead of getting a house in a perfect state of repair he gets one which is dilapidated. It is true that he may be able to let the dilapidated house for the same or even a higher rent than he was hitherto getting, but that may be due to market conditions and more especially to the demand for a certain class of premises. A dilapidated house must be worth less than a house in a proper state of repair. Presumably, if the house is sold, if in good repair, it would fetch more than a house which is out of repair. If a house can be let in good repair, it would ordinarily fetch a higher rent than one that is out of repair. Damage is therefore suffered. The measure of damage to be applied was laid down in *Joyner* v. *Weeks* (1). In that case the Divisional Court had applied the same rule as is applicable to a case where the lessee has failed to keep the house in repair during the term and ordered the damages to be assessed according to the injury done to the reversion. The Court of Appeal held that in these cases there was a well-defined rule which had become a rule of law that, on a failure to deliver up a house in good repair, the damage was the cost of the work necessary to put it into repair. Lord Esher M.R., in giving the judgment referred to the large number of cases in which this rule had been adopted, and said that such an inveterate practice amounted to a rule of law. He said it was a highly convenient rule, avoiding all the subtle refinements with which the court had been indulged and the extensive and costly inquiries which they would involve. It was a simple and business-like rule, and he was very much inclined to think it was an absolute rule.

But, as we have already said, that case must be regarded as proceeding on the footing that the plaintiff must have

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(1) [1891] 2 Q. B. 31.

C. A.

1949

JAMES
v.
HUTTON
AND
J. COOK
& SONS LD.
SAME
v.
SAME.

suffered damage by the tenant yielding up the house out of repair. We see no ground here for assuming that the plaintiff in this case has suffered any damage at all. She has got back a shop, or would have done, if the premises had not been requisitioned, provided with a modern and convenient front, and there was no suggestion that the work had not been carried out properly. We do not for one moment suggest that it might not be possible for a lessor in circumstances such as these to give evidence that she or her superior landlords at the end of the term desired to carry on or to let the premises for the purpose of carrying on a business for which the altered shop front would be inappropriate and the old one suitable. In that case she might well say that it is of value to her to have her shop back in its former condition and she would suffer damage, if the lessee's covenant to restore was not carried out, but if it is a mere matter of getting back a shop which has been altered and there is no suggestion that any damage whatever has been caused to the plaintiff thereby, it appears to us that she has suffered no damage by reason of the defendants' failure to comply with her requirements to reinstate. The official referee evidently thought that not only did the plaintiff not intend to do this work, but that it would be a sheer waste of money if the work were done, and as no evidence was given that the plaintiff has suffered any damage in fact, the court is not entitled, in our opinion, to come to the conclusion that she must have suffered damage by reason of the defendants not complying with her requirements.

In our opinion, therefore, she cannot be entitled to any more than nominal damage, which we should assess at twenty shillings, by reason of this breach of covenant. The learned official referee thought that there was no provision in the Landlord and Tenant Act, 1927, applicable to this case. On the view that we take of the common law rights of the parties, it is really unnecessary to consider the provisions of that Act, though we confess we have some difficulty in seeing why the provisions of s. 19, sub-s. 2, of the Act do not apply to this case. By that sub-section a covenant against making an improvement without licence or consent (and we think the word "improvement" in the sub-section means an improvement from the tenant's point of view) is to be subject to a proviso that consent is not to be unreasonably withheld, and, in fact, in this case it was given. The sub-section enacts that the proviso to this effect does not preclude the right of

C. A.
1949
JAMES v. HUTTON AND J. COOK & SONS LD. SAME v. SAME.

the lessor to require, as a condition of his consent in the case of an improvement which does not add to the letting value of the holding, a reasonable requirement that the tenant should reinstate the premises into the condition in which they were before the improvement was executed. It is true there was no evidence here whether the improvement did or did not add to the letting value of the holding. If it did, the sub-section would prevent the landlord requiring the tenant to reinstate and, in any case, such a requirement would have to be reasonable. For our part we cannot see that in this case it would be a reasonable requirement. At any rate, there was no evidence to show that it was reasonable. The most that was said was that some people might prefer the old front to the new, but it is perhaps unnecessary to give a final decision on the application of s. 19, sub-s. 2 for the reasons which we have already stated. [His Lordship then dealt with other issues on which this case is not reported.]

The appeal will be allowed and the cross-appeal disallowed.

Appeal allowed
Cross-appeal dismissed

Solicitors for the defendants: *Tudor & Rowe.*
Solicitors for the plaintiff: *Freke Palmer, Romain & Romain.*

C. G. M.

C. A.
1949
June 24, 27; *July* 8.
Bucknill Asquith and Denning, L.JJ.

TAMLIN *v.* HANNAFORD.

Landlord and tenant—Rent restriction—Dwellinghouse—Lease—Property of Great Western Ry. Co.—Nationalization of the railways—British Transport Commission—Not a servant or agent of the Crown—House subject to the Rent Restriction Acts.

The British Transport Commission is not a servant or agent of the Crown, and it has none of the immunities and privileges of the Crown; its servants are not civil servants and its property is not Crown property; and it is as much bound by Acts of Parliament as any other subject of the King. It is a public authority and its purposes are public purposes, but it is not a government department, nor do its powers fall within the province of government.

The only fact which, it could be suggested, made the commission a servant or agent of the Crown was the control over it exercised by the Minister of Transport (see s. 4 of the Transport Act, 1947);

but there was ample authority for saying that such control was insufficient for the purpose. See *Cannon Brewery Co. Ld.* v. *Central Control Board* (*Liquor Traffic*) [1918] 2 Ch. 101, 113; [1919] A. C. 744, 757.

Accordingly, a dwelling-house, formerly the property of a railway company, which had vested in the commission, by virtue of the Transport Act, 1947, is subject to the Rent Restriction Acts.

Per Curiam: In considering whether any subordinate body is entitled to Crown privilege the question is not so much whether it is an "emanation of the Crown," a phrase first used in *Gilbert* v. *The Corporation of Trinity House* (1886) 17 Q. B. D. at p. 801, but whether it is properly to be regarded as the servant or agent of the Crown. See *International Ry. Co.* v. *Niagara Parks Commission* [1941] A. C. 342–3.

When Parliament intends that a new corporation should act on behalf of the Crown, it, as a rule, so states in the statute constituting the corporation. In the absence of any such provision, the proper inference in the case, at any rate, of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department.

APPEAL from Plymouth county court.

The plaintiff was the tenant of a dwelling-house, No. 2, Buckland Street, Plymouth, as from March 25, 1946, his landlords having been the Great Western Ry. Co. He sub-let rooms therein to the defendant on a weekly tenancy. Having served notice to quit the rooms on May 11, 1948, on the defendant, who continued to occupy the rooms after that date, the plaintiff brought an action in the Plymouth county court claiming their possession. The defendant relied on the Rent Restriction Acts. His Honour, Judge Scobell Armstrong, held that by virtue of the Transport Act, 1947, the house had vested in the British Transport Commission and that the house must be regarded as "owned by the Crown and "administered by the British Transport Commission as Crown "agents." The Rent Restriction Acts, therefore, did not apply to the house and he made an order for possession of the rooms.

The sub-tenant appealed.

Sir Valentine Holmes K.C. and *J. P. Ashworth* for the sub-tenant. The British Transport Commission is not a servant or agent of the Crown. Their functions are of a commercial character: they are a commercial body. See the Transport Act, 1947, ss. 1 to 6, 9, 11, 14, sub-s. 3, 29, 30, 37. Section 90 of the Railway Clauses Consolidation

C. A.

1949

TAMLIN
v.
HANNAFORD.

Act, 1945, does not, it is plain, bind the Crown: yet by s. 74, sub-s. 1, of the Transport Act, 1947, that section is treated as binding the Commission. Part VI of the Act, dealing with finance, is inconsistent with the Commission being either a government department or an "emanation from the Crown." See ss. 88, 91, 92, 93, 94 sub-s. 6. See also ss. 100 and 123. The Crown Proceedings Act, 1947, was placed upon the statute book six days before the Transport Act, 1947. By s. 30, sub-s. 2, of the earlier Act: "Subject to the provisions "of the preceding sub-section, nothing in this Act shall "prejudice the right of the Crown to rely upon the law relating "to the limitation of time for bringing proceedings against "public authorities." But by s. 11 of the later Act: "The "Public Authorities Protection Act, 1893, and s. 21 of the "Limitation Act, 1839, shall not apply to any action, "prosecution or proceeding against the Commission . . . ." See *In re Wood's Estate* (1) as to the position of the Commissioners of Public Works and Buildings: they do not represent the Crown. The Town and Country Planning Act, 1947, was passed on the same day as the Transport Act, 1947, and in the former Act there is an express provision that the functions under the Act of the Central Land Board and of their officers and servants shall be exercised on behalf of the Crown: see s. 3, sub-s. 3. There is no such provision in the Transport Act, 1947. The British Transport Commission, not being a servant or agent of the Crown, this dwelling-house, vested in them, was not Crown property and the Rent Restriction Acts apply to it.

The plaintiff was the tenant of this dwelling-house. He was, in any case, not a civil servant and the further point arises whether he is at liberty to avail himself of this rule relating to the Crown.

Redmond Barry K.C. and *Frank Cridlan* for the tenant. The British Transport Commission is an agent of the Government and of the Crown, control being exercised over it by the Minister of Transport. See s. 4 of the Act. This dwelling-house was Crown property. As Denning J. said in *Territorial Forces Association* v. *Philpot* (2): "It is plain "that if premises are occupied for public purposes and are, "therefore, deemed part of the use and service of the Crown, "they are exempted from rating." Public purposes fall within the sphere of government since the sphere of government

(1) (1886) 31 Ch. D. 607.

(2) [1947] 2 All E. R. 376, 377.

is not static, but is continually growing. The real question is: What at this date is the true province and sphere of central government? In *Mersey Docks and Harbour Board* v. *William Cameron and Others* (1) it was held that trustees to maintain docks at one port only, that of Liverpool, were liable to be rated as occupiers. It would require a bold man to suggest that the control of docks at one particular port was a matter of central government. But today, transport is a vital requirement for the welfare of the country—being a nation-wide service—and it has been taken over by the State. The function of the British Transport Commission and of the Railway Executive is as wide in its ramifications as that of the Post Office. See also *International Ry. Co.* v. *Niagara Parks Commission* (2) where the Commissioners acted on behalf of and with the approval of the province of Ontario. Turning to s. 2 of the Transport Act, 1947, the powers of the British Transport Commission are no doubt of a commercial character; but that does not take them out of the sphere of the functions of central government. The Post Office is a commercial concern, but it is a government department and its officers are civil servants. The word "commission" connotes centralization more than the word "corporation." Compare the use of the word in the cases of the Forestry Commission and the War Damage Commission acting under the auspices of the Treasury. In *Graham* v. *Public Works Commissioners* (3), Phillimore J., speaking of the Commissioners of Public Works and Buildings, said (4): "The Crown has with the consent of Parliament, in certain "cases established certain officials who are to be treated as "agents of the Crown but with a power of contracting as "principals. The Secretary of State for War and the "Postmaster-General are known instances of this." See also *Sanitary Commissioners of Gibraltar* v. *Orfila and Others* (5). Turning again to the Transport Act, 1947, reliance is placed on the terms of s. 4 which set out the powers of the Minister in relation to the Commission. The Minister's control is complete.

The decision of the county court judge was correct. The dwelling-house was the property of agents of the Crown, and so Crown property. The Rent Restriction Acts, therefore, were not applicable to it.

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(1) (1864) 11 H. L. C. 443.

(2) [1941] A. C. 328.

(3) [1901] 2 K. B. 781.

(4) Ibid. 790.

(5) (1890) 15 App. Cas. 400.

J. P. Ashworth replied.

Cur. adv. vult.

July 8. DENNING L.J., read the judgment of the court: The plaintiff was the lessee of a house, No. 2, Buckland Street, Plymouth, which used to belong to the Great Western Railway Co. The defendant was the sub-tenant of some rooms in the house and was protected in those days by the Rent Restriction Acts. On the nationalization of the railways, however, the house became vested in the British Transport Commission, by virtue of the Transport Act, 1947, and the county court judge has held that, on that account, the defendant has lost the protection of the Rent Restriction Acts. The judge said that the house " must be regarded as " owned by the Crown and administered by the British " Transport Commission as Crown agents," and that the house " being now Crown property, is no longer within the " scope of the Rent Restriction Acts." He accordingly made an order for possession.

It is, of course, a settled rule that the Crown is not bound by a statute unless there can be gathered from it an intention that the Crown should be bound; and it has been held that, under this rule, the Crown and its servants and agents are not bound by the Rent Restriction Acts. (See, for instance, *Territorial and Auxiliary Forces Association of the County of London* v. *Nichols* (1). In considering whether any subordinate body is entitled to this Crown privilege, the question is not so much whether it is an " emanation of the " Crown," a phrase which was first used in *Gilbert* v. *Corporation of Trinity House* (2), but whether it is properly to be regarded as the servant or agent of the Crown. (See *International Railway Co.* v. *Niagara Parks Commission* (3). In the case of the British Transport Commission, this depends on the true construction of the Transport Act, 1947. We have considered the provisions of that statute and, for the sake of clarity, we propose to state their effect without referring to the various sections in detail.

The Transport Act, 1947, brings into being the British Transport Commission, which is a statutory corporation of a kind comparatively new to English law. It has many of

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(1) [1949] 1 K. B. 35.

(2) (1886) 17 Q. B. D. 795, 801.

(3) [1941] A. C. 328, 342–3.

C. A.

1949

TAMLIN
v.
HANNAFORD.

the qualities which belong to corporations of other kinds to which we have been accustomed. It has, for instance, defined powers which it cannot exceed; and it is directed by a group of men whose duty it is to see that those powers are properly used. It may own property, carry on business, borrow and lend money, just as any other corporation may do, so long as it keeps within the bounds which Parliament has set. But the significant difference in this corporation is that there are no shareholders to subscribe the capital or to have any voice in its affairs. The money which the corporation needs is not raised by the issue of shares but by borrowing; and its borrowing is not secured by debentures, but is guaranteed by the Treasury. If it cannot repay, the loss falls on the Consolidated Fund of the United Kingdom; that is to say, on the taxpayer. There are no shareholders to elect the directors or to fix their remuneration. There are no profits to be made or distributed. The duty of the corporation is to make revenue and expenditure balance one another, taking, of course, one year with another, but not to make profits. If it should make losses and be unable to pay its debts, its property is liable to execution, but it is not liable to be wound up at the suit of any creditor. The taxpayer would, no doubt, be expected to come to its rescue before the creditors stepped in. Indeed, the taxpayer is the universal guarantor of the corporation. But for him it could not have acquired its business at all, nor could it now continue it for a single day. It is his guarantee that has rendered shares, debentures and such like all unnecessary. He is clearly entitled to have his interest protected against extravagance or mismanagement.

But there are other persons who have also a vital interest in its affairs. All those who use the services which it provides —and who does not?—and all whose supplies depend on it, in short everyone in the land, is concerned in seeing that it is properly run. The protection of the interests of all these—taxpayer, user and beneficiary—is entrusted by Parliament to the Minister of Transport. He is given powers over this corporation which are as great as those possessed by a man who holds all the shares in a private company, subject, however, as such a man is not, to a duty to account to Parliament for his stewardship. It is the Minister who appoints the directors —the members of the Commission—and fixes their remuneration. They must give him any information he wants; and, lest they should not prove amenable to his suggestions as to

C. A.

1949

Tamlin v. Hannaford.

the policy they should adopt, he is given power to give them directions of a general nature, in matters which appear to him to affect the national interest, as to which he is the sole judge, and they are then bound to obey. These are great powers but still we cannot regard the corporation as being his agent, any more than a company is the agent of the shareholders, or even of a sole shareholder. In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government.

The correctness of these views is shown by the way in which the railways have been dealt with. Apart from the special provisions as to the constitution of the Commission, all that has happened is that there has been an amalgamation of the previous railway companies into one concern which is expressly made subject to the same rights and liabilities as were the railway companies, including statutory duties, contractual obligations, and even some customary obligations. This one amalgamated concern is run by a statutory corporation called the Railway Executive, but this corporation is nothing more nor less than the agent of the Commission. So far as third persons are concerned, the Railway Executive is treated as running the railways on its own account. For instance, the officers and servants of the former companies are treated as officers and servants of the Railway Executive and not of the Commission. But in the last resort, it is the Commission which is responsible. If a judgment against the Railway Executive is not satisfied, execution can be levied against the property of the Commission. All this seems to be quite inconsistent with the notion that the Commission is itself a government department or an agent of the Crown. Execution is not leviable against a government department, even under the Crown Proceedings Act, 1947.

We do not find it very useful to draw analogies from other bodies which are differently constituted and differently controlled and exist for different purposes. The Territorial Forces Associations, for instance, are not concerned with commercial matters, but with the defence of the realm, which is essentially the province of government and are therefore to be considered agents of the Crown: *Territorial Forces Association* v. *Philpot* (1); *Territorial and Auxiliary Forces Association of the County of London* v. *Nichols* (2). The Post Office is the nearest analogy. It is, of course, concerned with commercial matters, but is nevertheless a government department and its servants are civil servants. That is, however, an anomaly due to its history. The carriage of mail was a Crown monopoly long before the Postmaster-General was incorporated. But the carriage of passengers and goods is a commercial concern which has never been the monopoly of anyone and we do not think that its unification under state control is any ground for conferring Crown privileges upon it.

The only fact in this case which can be said to make the British Transport Commission a servant or agent of the Crown is the control over it which is exercised by the Minister of Transport; but there is ample authority both in this Court and in the House of Lords for saying that such control as he exercises is insufficient for the purpose. (See *Cannon Brewery Co. Ld.* v. *Central Control Board* (*Liquor Traffic*) (3).) When Parliament intends that a new corporation should act on behalf of the Crown, it as a rule says so expressly, as it did in the case of the Central Land Board by the Town and Country Planning Act, 1947, which was passed on the very same day as the Transport Act, 1947. In the absence of any such express provision, the proper inference, in the case, at any rate, of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department.

In our opinion, therefore, the British Transport Commission is not a servant or agent of the Crown and its property is as much subject to the Rent Restriction Acts as the property of any other person. The defendant is therefore entitled to raise the Rent Restriction Acts. Sir Valentine Holmes mentioned a further point, namely, whether in any case the plaintiff, who was clearly not the servant or agent of the Crown, could avail himself of the rule relating to the Crown; but it was not argued and we express no opinion on it. The

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(1) [1947] 2 All E. R. 376.

(2) [1949] 1 K. B. 35.

(3) [1918] 2 Ch. 101, 113; [1919] A. C. 744, 757.

C. A.
1949

TAMLIN
v.
HANNAFORD.

appeal is allowed and the case remitted to the county court for the decision of that court in the light of this judgment.

Appeal allowed.
Case remitted to the county court.

Solicitors for the sub-tenant: *Kenneth Brown, Baker, Baker, for W. H. Sloman, Plymouth.*

Solicitors for the tenant: *Kinch and Richardson, for Broadbent and Huddart, Plymouth.*

C. G. M.

C. C. A.
1949
Aug. 29, 30.

Humphreys, Hilbery and Croom-Johnson JJ.

REX *v.* THOMAS.

Criminal law—Wounding with intent to murder—Conviction—Sentence of penal servitude—Subsequent death of person wounded—Indictment for murder—Plea of autrefois convict—Plea not available to accused.

Where a person has been convicted of wounding with intent to murder and the person wounded subsequently dies of the wounds inflicted, a plea of autrefois convict is not a good answer by the person who inflicted the wound to an indictment for murder.

APPEAL against conviction.

On May, 1949, the appellant, Leonard Jack Thomas, was convicted at the Central Criminal Court of having, on March 20, 1949, feloniously wounded his wife, Florence Ethel Lavinia Thomas, with intent to murder her, and was sentenced to seven years' penal servitude. The appellant's wife died on June 2, 1949, as the result of the wounds she had received, and on July 13, 1949, the appellant was indicted at the Central Criminal Court before Devlin J., on a charge of murdering her. In answer to the indictment the appellant set up a plea of autrefois convict. Devlin J. held as a matter of law that there was no evidence on which the jury could find that the offence of which the appellant had been previously convicted was the same as that with which he was then charged and under his direction the jury returned a verdict that the plea of autrefois convict had not been established. The appellant was then tried on his plea of not guilty to the indictment for murder and found guilty. He appealed on the ground that the plea of autrefois convict was wrongly rejected.

Paget K.C., Rose and Heald for the appellant. Devlin J. was wrong in directing the jury that they must return a verdict that the plea of autrefois convict was not available in the case of the appellant. There are two submissions to be made on his behalf: (1.) that he was twice placed in peril of being convicted of attempted murder, which is a genuine plea of autrefois convict, and (2.) that he was punished twice for the same act, which is contrary to law. The plea of autrefois convict is a very ancient one in English law and dates from Plantagenet times. The basis of the plea is that no man should be put twice in peril on the same charge. In the present case, on the indictment for murder it would have been open to the jury under s. 9 of the Criminal Procedure Act, 1851, to have found the appellant guilty of attempted murder which, in substance, is the same offence as wounding with intent to murder, of which he had already been convicted and that is sufficient to justify a plea of autrefois convict (see *Rex* v. *White* (1)). It is conceded that *Rex* v. *Tonks* (2) is against the submission put forward on this point, but the observations of Lord Reading C.J. in that case, when dealing with this matter, were obiter. Further, it is submitted that the principle of autrefois convict is wide enough to embrace the broader proposition that a man should not be punished twice for the same act (see per Blackburn J., in *Wemyss* v. *Hopkins* (3) and per Pollock B. in *Reg.* v. *Miles* (4)). This view is supported by the Interpretation Act, 1889, s. 33, which provides that "where an act or omission constitutes an offence "under two or more Acts, or both under an Act and at common "law . . . . the offender shall . . . . be liable to be "prosecuted and punished under either or any of those Acts "or at common law, but shall not be liable to be punished "twice for the same offence." Commenting on this section, Archbold's Criminal Pleading, 31st ed., p. 135, says: "Perhaps "this enactment would have been clearer if, for the word "'offence' at the end had been substituted the words 'act "'or omission.'" It is submitted that what must be looked at is the "act or omission," and in the present case the act of stabbing which led to the murder was precisely the same act for which the appellant has already been punished. The statement in Archbold is supported by the observations of Hawkins J., Pollock B., and Charles J., in *Reg.* v. *Miles* (4), and

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(1) [1910] 2 K. B. 124.

(2) [1916] 1 K. B. 443.

(3) (1875) L. R. 10 Q. B. 378, 381.

(4) (1890) 24 Q. B. D. 423.

C. C. A.
1949
Rex
v.
Thomas.

by the dissenting judgment of Kelly C.B. in *Reg.* v. *Morris* (1), where he laid down the test that what must be looked at was whether the act was the same and not whether the offence was the same. In *Rex* v. *Tonks* (2), which appears to be against this view, it does not appear from the argument that the question of double punishment was raised. Devlin J. expressed the view that the statement in Archbold that "offence" in s. 33 of the Interpretation Act, 1889, should be read as meaning "act or omission" was wrong, but it is submitted that the comment is right and that "offence" can bear two different meanings, namely, "a charge" or an "act or omission." If the relevant consideration is the act done, it is clear that the appellant was placed in peril of being twice punished for the same act, and that a plea in the nature of a plea of autrefois convict can rightly be put forward on his behalf.

Anthony Hawke and J. S. Bass for the Crown were not called on to argue.

Cur. adv. vult.

Aug. 30. Humphreys J. The appellant was convicted at the Central Criminal Court on May 2, 1949, of having on March 20, feloniously wounded his wife, Florence Ethel Lavinia Thomas with intent to murder her, and was sentenced to seven years' penal servitude. At that time his wife was in hospital. On June 2, she died as the result of the wounds she had received, so a jury has since found, and the appellant was indicted at the Central Criminal Court on July 13, in accordance with the usual practice, for the murder of his wife. I repeat those words "in accordance with the usual practice," because it is the usual practice; similar facts have occurred time out of mind, and the same results have followed.

The appellant handed in as his answer to the indictment, a plea in bar, that is a plea of autrefois convict. The trial judge, Devlin J. after listening to a very long argument, held that the plea was not made out, and so directed the jury, who followed the judge's direction. The appellant was then tried on his plea of not guilty to the indictment for murder, and the jury convicted him. From that conviction he has appealed to this court, the sole ground of appeal being that his plea of autrefois convict ought not to have been rejected. He makes no complaint of any sort with regard to his trial for murder, and the only question, therefore, is: was the plea of autrefois convict a bar in law to the indictment for murder.

(1) (1867) L. R. 1 C. C. R. 90.

(2) [1916] 1 K.B. 443.

The nature of the plea, and indeed the law relating to it, sufficiently appear from the language of the plea itself which alleges that the King ought not further to prosecute the indictment against the appellant because he has been lawfully convicted of the offence charged therein. Those are the terms of the plea.

The offence or crime of murder consists in the felonious killing of another with malice. It is plain that on May 2 the accused was not convicted of that offence, nor of anything which is substantially the same offence or crime as that charged in the indictment, nor could he have been, since his wife was then alive. It follows that the plea of autrefois convict in the strict sense of the term is bound to fail, and does fail.

That would be enough to dispose of this case, but for the fact that at great length before the judge, and for a shorter time before this court, Mr. Paget put forward other grounds which, as he said, do not depend on the plea of autrefois convict, but are of the same nature. He referred the judge at the trial to a number of cases, mostly charges of assault, in which the courts expressed their approval of the ancient maxim, "Nemo "bis debet puniri pro uno delicto," that is to say, that no one ought to be twice punished for one offence, or as it is sometimes written, "pro eadem causa," that is for the same offence, and have treated the earlier conviction as being a bar to a second indictment.

In *Reg* v. *Miles* (1), which is perhaps the strongest case in the appellant's favour in relation to charges of assault, the accused, who had previously been convicted of an assault before a court of summary jurisdiction, was indicted on five counts. The first count charged him with unlawful and malicious wounding, the second with inflicting grievous bodily harm on the same person on the same occasion, the third with assaulting him and causing him actual bodily harm on the same occasion, and the fourth with a common assault on the same occasion, this being the assault of which he had previously been convicted. The fifth count related to an assault on another person and on this count the accused was acquitted. He was convicted on the other four counts. The accused entered a plea in bar in which he alleged that the assault of which he had been convicted previously and the wounding and battery in the first four counts of the indictment, were one and the same assault and battery and not other and

(1) 24 Q. B. D. 423.

different. The Court for the Consideration of Crown Cases Reserved upheld the appellant's plea, which they regarded as an informal plea of autrefois convict, and it is important to examine the reasons why they so held. All the judges considered that the plea and the evidence established that there was one offence only committed by the accused. It was one and the same assault, although in three of the counts that assault was alleged to have been accompanied by circumstances of aggravation. Pollock B., in his judgment, said: "At the "trial it was proved on behalf of the prisoner, and admitted "by counsel for the prosecution, that the first four counts "of the indictment referred to the same matter as the offence "mentioned in the record. In substance, therefore, the plea "and the evidence establish that there was but one offence, "and that the acts done by the defendant in respect of which "he was convicted, by whatever legal name they might be "called, were the same as those to which the indictment "referred," and he then quotes the Latin maxim. The late Charles J., in whose judgment Lord Coleridge C.J. and Grantham J. concurred, referred to the rule which I have previously mentioned as the "well-established rule at common "law that where a person has been convicted of an offence "by a court of competent jurisdiction, the conviction is a bar "to all further criminal proceedings for the same offence."

Hawkins J., who gave the first judgment in the case—a very long one, for he went in great detail into a number of matters to which it is unnecessary to refer for the purpose of this case—agreed with the proposition which I have just read from the judgments of Pollock B. and Charles J., and said: "But "it is not every summary conviction or acquittal for a common "assault which will operate as a bar to an indictment for an "offence in which that assault was an element." That is precisely the present case, because no one will doubt that the assault committed on the deceased woman was an element in the charge of murder,—it was one of the principal elements—and the other was the death of the woman.

Hawkins J. continued: "It could hardly be contended that "a previous conviction for a common assault could be pleaded "in bar to an indictment for murder, though to prove the "murder it might be essential to prove the assault adjudicated "upon. For the offence of murder consists in the felonious "killing." In our judgment, that observation applies with equal force to the present case, and is sufficient to dispose of this case so far as it depends on autrefois convict. It is right to say, though lawyers will not need the information, that when the judge was speaking of a common assault in that case, his observations would equally apply to every other form of assault. The point in that case was that there was one assault, and every count in the subsequent indictment charged that assault, and nothing else, except that there were circumstances of different degrees of aggravation added to it, otherwise it was one and the same assault.

In deference to the argument which we heard, and which the trial judge whose decision is here in question heard at much greater length, it is right to add this : Reference was made by Mr. Paget to s. 33 of the Interpretation Act, 1889, and he said that that section assisted his argument. It provides that " Where an act or omission constitutes an offence under two " or more Acts, or both under an Act and at common law . . . . " the offender shall, unless the contrary intention appears, " be liable to be prosecuted and punished under either or any " of those Acts or at common law, but shall not be liable to be " punished twice for the same offence." That section may be said to state in the language dear to those persons who are responsible for the language of statutes, what the common law says in very much shorter and simpler language. It certainly adds nothing to, and it detracts nothing from, the common law. Mr. Paget has argued that we ought to read the last word, " offence " in the section as meaning " act," and according to his contention " act," " cause," and " offence" all mean the same thing.

In our view that is not correct. It is not the law that a person shall not be liable to be punished twice for the same act ; it has never been so stated in any case, and the Interpretation Act itself does not say so. What s. 33 says is : " No person shall be liable to be punished twice for the " same offence." Not only is it not the law that a person shall not be punished twice for the same act, but it never has been the law. That it is not the law was expressly decided as far back as 1867 in *Reg.* v. *Morris* (1) by the highest criminal court in the land then existing, the Court for the consideration of Crown Cases Reserved.

The court was composed of Kelly C.B., Martin B., Byles J., Keating J. and Shee J., and the case had been reserved for the consideration of the court by Pigott B. The headnote is as

(1) L. R. 1 C. C. R. 90; 10 Cox C. C. 480, 484.

follows: "A previous summary conviction for an assault" under the Act "is not a bar to an indictment for manslaughter "of the party assaulted, founded upon the same facts. "Kelly C.B. dissentiente."

I will first read a part of the judgment of Martin B., adding that his judgment was agreed with by Byles J., Keating J. and Shee J. Martin B. stated the facts as follows: "Thomas "Morris was convicted of an assault on Timothy Lymer and "committed to prison. . . . He has undergone that punish-"ment, and Timothy Lymer, the man assaulted, has since died "in consequence of that assault. Now, this indictment is for "the manslaughter of that man; and the question is, whether "the suffering of the imprisonment for the assault is an answer "to that indictment, and that depends on the meaning of the "words 'for the same cause' in the statute." Later, he said: "The cause on which the justices adjudicated," that is the assault "was not the same as that for which the prisoner has "been convicted under this indictment," that is the manslaughter. "A new offence, in my opinion, arose when the "man died. I think therefore that this conviction was "right."

Byles J. said: "I am of opinion that the prior conviction ". . . . affords no defence to the subsequent indictment for "manslaughter, the death of the deceased having occurred "after the conviction, but being a consequence of the assault. "The form and intention of the common law pleas of autrefois "convict and autrefois acquit show that they apply only "where there has been a former judicial decision on the same "accusation in substance, and where the question in dispute "has been already decided. There has, in the present case, "been no judicial decision on the same accusation, and the "whole question now in dispute could not have been decided, "for at the time of the hearing before the magistrates whether "the assault would amount to culpable homicide or not "depended on the then future contingency whether it would "cause death." A little lower down he says: "The cause "for the present indictment comprehends more than the cause "in the former summons before the magistrates, for it com-"prehends the death of the party assaulted. It is therefore, "at least in one sense, not the same cause." At the end of the judgment he uses these words: "My Brother Martin has "already illustrated the mischief in civil cases by a reference "to Lord Campbell's Act, and in criminal cases the mischiefs

" might be much greater. A murderer, for example, by " suffering or obtaining a previous conviction for an assault, " might escape the due punishment of his crime."

It is only right to refer shortly to Kelly C.B.'s dissenting judgment and, with the most profound respect to him, it must be said that so far as I am aware his judgment has never been quoted with approval in any case since 1867, and has never been followed. What he said was precisely what Mr. Paget has argued before us, or rather perhaps it would be more accurate to say that Mr. Paget has argued before us something founded on what Kelly C.B. said in 1867, which was not the law and which was disagreed with by the other four judges. This is what Kelly C.B. said: " The assault, " the unlawful act, with which he was charged "—that is the manslaughter—" is the same assault and one and the same " act as that which caused the death of Lymer, and of which " he has been convicted under the present indictment." He was putting it the other way round—the original assault was the same assault as the one of which he had been convicted under the present indictment. The answer is, of course, he was not convicted of assault under that indictment at all, he was convicted of manslaughter. Kelly C.B. continued: " I think, therefore, that the case comes within the precise " words " of the Act, " ' He shall be released from all further " ' or other proceedings, civil or criminal, for the same cause.' "

Mr. Paget, however, relied on a passage in Archbold's Criminal Pleading, 31st ed. p. 135, and the same statement occurs, as I have been able to find out, in every edition since 1889. It appears under the heading of " autrefois acquit " and, after quite properly referring to Hawkins Pleas of the Crown, where it is stated that " it is an established rule of the " common law that a man may not be put twice in peril for " the same offence,"—which shows that the principle is as old as Hawkins Pleas of the Crown—the editor refers to various matters, and finally to the Interpretation Act, 1889. After quoting s. 33, which I have already read, he says this: " Per- " haps this enactment would have been clearer if for the word " ' offence ' at the end had been substituted the words ' act " ' or omission.' But it does no more than extend to statutory " offences the common law rule as laid down in *Reg.* v. *Miles* " (1)." Exactly what that means I do not know. It is quite clear that the word in s. 33 is " offence " and, speaking for myself, I deprecate the suggestion by any textbook writer that the Act, in order to make things clear, should have enacted something quite different. The answer is that it does not. Later on in the same textbook, we find a different statement as to the law, and still further on yet another statement on the law in regard to autrefois convict,—all of which do not agree with one another. There is, I think, a certain amount of mental confusion on the part of the writer, who was responsible for the statement on page 135. Exactly what it means, it is not necessary for this court to decide, but we are all agreed that if that passage bears the interpretation which Mr. Paget would seek to put upon it, then in the opinion of the court, it is wrong.

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(1) 24 Q. B. D. 423.

Reg. v. *Morris* (1) was followed in *Reg.* v. *Friel* (2). That case came before Williams J., and the report contains a very full and interesting statement of the law by that learned judge. Friel had been convicted of an assault under the Summary Jurisdiction Act and the person assaulted had subsequently died of the injuries caused by the act constituting the assault. Friel was indicted for manslaughter and a plea of autrefois convict was put in, in answer to the indictment. It was held that the plea was not a good answer to the indictment for manslaughter. Williams J. having taken time to consider an application that he should reserve the question for the Court for the Consideration of Crown Cases Reserved, said this: "I have looked at the authorities, and I think that "it is plain on the authorities that a conviction or acquittal "on an indictment for an assault cannot be pleaded in bar "to a subsequent indictment for murder or manslaughter. "This proposition is expressly laid down by Byles J. in "delivering the judgment of himself and Keating J., in *Reg.* "v. *Morris* (1). It is true that Kelly C.B. dissented, and is "true that in that case the question to be decided was the "construction and effect of 24 & 25 Vict., c. 100, ss. 44-45, "and was not the question of the effect of a previous conviction "on an indictment, but the decision has, I believe, always "been recognized as a decision on the common law question, "and is so treated by Hawkins J. in the recent case of *Reg.* "v. *Miles* (3), where he says 'it would hardly be contended "'that a previous conviction for a common assault could be "'pleaded in bar to an indictment for murder, though to

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(1) 10 Cox C. C. 480.

(2) (1890) 17 Cox C. C. 325.

(3) 24 Q. B. D. 423.

" ' prove the murder it might be essential to prove the assault " ' adjudicated upon. For the offence of murder consists in " ' the felonious killing.' So also of manslaughter (see *Reg.* " v. *Morris* (1). This seems in accordance with principle. " The indictment for manslaughter is not a charge, in a new " form based on the facts supporting the former charge, nor " is it the former charge with the addition of matters of " aggravation or of newly alleged consequences. It is a charge " based on new facts; and the circumstances that some of " those facts have been made the basis of a former charge of " a different class is immaterial. The difference is not of " degree merely. The characteristic new fact here is the " death. That death is a new fact, and not a mere matter of " aggravation or a mere consequence, is plain from the consideration that in cases of manslaughter, where the charge " is based on death resulting from culpable negligence, there " is no criminal offence unless death ensues and gives rise to " a charge of manslaughter. I wish to add that this view of " the law that a prior conviction for assault cannot be effectively " pleaded in bar to a subsequent indictment for murder or " manslaughter, is confirmed by the great authority of " Stephen J. in his book on Criminal Law Procedure, p. 173, " who, though in terms he does not mention manslaughter, " yet lays down the principle, and gives indictment for murder " after a previous conviction for unlawful wounding as an " illustration, and no reason has been suggested to me, or " I believe could be suggested, why the doctrine thus illustrated " should not include manslaughter as much as murder." No authority was cited to us by Mr. Paget in support of his argument on the point now under consideration, but on the other hand there are many other decisions to be found in the books which are quite inconsistent with Mr. Paget's argument. In the report of *Reg.* v. *Morris* (1), there is a reference by way of note to a case of *Reg.* v. *de Salvi.* The accused was indicted for the wilful murder of one Robertson, and a plea of autrefois acquit was pleaded, to which the Crown demurred, and the plea was held bad in law. The case is not fully reported although there is a very full account of the whole matter, including the argument, and perhaps therefore it would be more satisfactory not to rely too much on it. On the facts, it appears to have been precisely the present case. De Salvi having been indicted for wilful murder, it was proved that he had previously been indicted for cutting and wounding with intent to murder and had been acquitted on that charge. When he was subsequently charged with killing the person in regard to whom he had been acquitted on the charge of cutting and wounding, the court held unanimously that a plea of autrefois acquit was no answer, and that he must be tried on the charge of murder.

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(1) 10 Cox C. C. 480.

Those are precisely the facts of this case, because the offence there was the same as that which was charged against the appellant. Of that offence he was convicted, and he was subsequently indicted for murder. But, although as I have said, the case is not so satisfactory as if it had been as fully reported as the other cases dealing with the same question, it certainly cannot be said to assist Mr. Paget in any way in his argument. That is all that is necessary to be said, and that is all in effect that Mr. Paget was able to say on his main point, but he then developed another point. He said that it is a recognized rule that not only may a person not be indicted for an offence of which he has already been convicted or acquitted, but that he must not be indicted for an offence on which he was in peril on the former occasion, and, within certain narrow limits, that may be accurate. Then he said that the appellant having been convicted of wounding with intent to murder, he could have been convicted by the jury, on the murder indictment of that same offence. When counsel made that statement, the court asked: "What is "the authority for that?" because none of us was aware that there ever had been such a proposition put forward in a court of law. Mr. Paget's answer was: "I have no "authority in support," and one of my brothers then asked him the pointed question: "Can you tell the court of any "case that you have ever heard of anywhere in England "where it has even been suggested that a man who is tried "on a charge of murder may be found by the jury not guilty "of murder but guilty of wounding with intent to murder," and the answer was, No. So that this is an entirely novel proposition.

The ordinary rule is well enough known; there is no question about it. The jury is bound to find a verdict, if they agree, on the indictment. They are not allowed to find any other than a verdict of guilty or not guilty unless some statute, or in very rare cases the common law, permits them to find some lesser or different crime, while acquitting on the actual charge in the indictment. That is the rule. There are, of course, very numerous exceptions to that rule, because a great many statutes of different kinds have been passed, particularly within the last fifty years, which enable a jury on a particular charge to find the accused either guilty of the charge in the indictment or of some other offence.

But although there are many such instances, no one has ever suggested hitherto that there is either a statute or a common law rule enabling a jury, on a charge of murder, to find that the accused has been guilty of this statutory felony of wounding with intent to murder. On an indictment for murder the jury can, of course, find a verdict of manslaughter, which is comprised in murder, and in every indictable offence they can, since 1851, find an attempt to commit the offence charged. That is a very formidable objection to Mr. Paget's argument, and indeed it cuts away the whole basis of it. But assume for the moment that a jury could find such a verdict as he suggests; what is the result? Mr. Paget contended that if the jury could find the appellant guilty of wounding with intent to murder, then he was, on the indictment for murder, in peril of being convicted of wounding with intent to murder, and he submitted that that point was so decided by the Court of Criminal Appeal in *Rex* v. *White* (1). When that case is looked at, it has nothing whatever to do with autrefois convict or autrefois acquit. White, in fact, was not convicted twice or acquitted twice because he was only tried once. The head-note to the report is as follows: "A person who upon an indictment charging him with murder "is convicted under s. 9 of the Criminal Procedure Act, 1851, "of an attempt to murder may be sentenced to penal servitudo "for life by virtue of the provisions of ss. 11-15"—and I would say for myself that s. 15 is the important one—"of the Offences "Against the Person Act, 1861."

In 1851 a general statute, the Criminal Procedure Act, 1851, was passed which enabled juries in most cases to return a verdict of not guilty of the crime charged, but guilty of the attempt. Later on the Offences Against the Person Act, 1861, was passed which contained a number of new provisions and dealt with what were called statutory felonies.

The sole question in *Rex* v. *White* (1) was whether in the circumstances of that case, the offence of which the accused was convicted came within the list of statutory felonies, or whether it ought still to be regarded as a common law misdemeanor, and what sentence could be imposed. The court held that any person charged with murder whom the jury found not guilty of murder but guilty of attempted murder, was thereby convicted of an offence for which he was liable—whether the full sentence was passed or not—to be kept in penal servitude for life. That is the whole of the decision in *Rex* v. *White* (1), and I am unable to understand Mr. Paget's argument that it is an authority for saying that a jury on a charge of murder can find a verdict of wounding with intent to murder.

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(1) [1910] 2 K. B. 124, 130.

It is necessary just to refer to one more case, *Rex* v. *Tonks* (2), so far as it deals to some extent with the question of what is to happen when a man is tried on a charge on which it is open to the jury to find him guilty of some other offence of which he has been already convicted. In referring to the case, both in the court below and in this court, Mr. Paget frankly said that it was one of his great difficulties. Mrs. Tonks had been convicted of the offence of wilfully neglecting her child in a manner likely to cause injury to its health, and she was sentenced to prison for that offence. While she was in prison, the child died, it must be assumed, as the result of that neglect. She was then charged, in accordance with the usual practice, with manslaughter in respect of the same neglect for which she had been sent to prison, but there was the added fact of the death.

Lord Reading C.J., gave the judgment of the court, the other members being Lord Coleridge J. and Avory J. and, after referring to a number of other matters which were raised, said that it appeared that under s. 12, sub-s. 4 of the Children Act, 1908, under which the accused had originally been convicted, there was a special provision that if a person was charged with manslaughter of a child as the result of neglect, and the jury did not think that the child died as the result of that neglect but were satisfied that there had been criminal neglect of the child, they might, on the charge of manslaughter, convict on the charge of criminal neglect instead of manslaughter. Lord Reading C.J. said: "When the death "occurs after the conviction for the lesser offence and "an indictment for manslaughter is preferred, no difficulty "arises, because proper effect can be given to s. 12, sub-s. 4, "by the judge telling the jury that they must, having "regard to the special facts of the case, either come to the "conclusion that the accused is guilty of manslaughter or "return a verdict of acquittal."

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(1) [1910] 2 K. B. 124.

(2) [1916] 2 K. B. 443.

Rex v. *Tonks* (1) was cited by Mr. Paget to Devlin J. in support of his argument on the question of autrefois convict. Although it has not been read in court, we have read the summing up of Devlin J. on the indictment for murder, since it is part of the necessary documents in the case. He told the jury that in this particular case they must either convict of murder or return a verdict of not guilty. That was exactly what Lord Reading C.J. in *Rex* v. *Tonks* (1) said that a judge might do in such a case as the present and Devlin J. was perfectly right in giving that direction. Finally, we have read the closely reasoned judgment of Devlin J., and we agree with the result at which he arrived and with the reasons upon which that result is based. The appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant: *The Registrar of the Court of Criminal Appeal.*

Solicitor for the prosecution: *The Director of Public Prosecutions.*

(1) [1916] 1 K. B. 443.

P. B. D.

WHEATLEY *v.* WHEATLEY.

1949
July 19, 20.

Lord Goddard C.J., Oliver and Stable JJ.

Husband and wife—Maintenance order—Husband and wife living under same roof—Order not enforceable—"Resides with"—"Cohabitation"—Decision of Divisional Court criticized by Court of Appeal—Not overruled—Duty of justices to follow decision of Divisional Court—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 51), *s.* 1, *sub-s.* 4; *s.* 2, *sub-s.* 2.

Section 1, sub-s. 4, of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, provides that a maintenance order made under Summary Jurisdiction (Separation and Maintenance) Act, 1895, shall not be enforceable "whilst the married woman "with respect to whom the order was made resides with her "husband."

Held, that a wife "resides with" her husband within the meaning of that sub-section if she lives in the same house, whether or not they live together as husband and wife.

Evans v. *Evans* [1948] 1 K. B. 175, followed.

Dicta of Denning L.J. in *Hopes* v. *Hopes* [1949] P. 227, 237, 238, disapproved.

Appeal by case stated from Essex justices.

On February 3, 1949, justices granted a wife a maintenance order, under which her husband was to pay her 2*l*. per week thenceforward. The following facts appeared in the case stated: The husband made only one payment under the order of February 3, 1949, and on March 10, 1949, the payments were 6*l.* in arrear. The husband and wife were living in the same house, and the husband paid for fuel and light. The house comprised a sitting-room, kitchen, and three bedrooms. The parties occupied different bedrooms, but they both used the kitchen. Because the husband kept his own ration book the wife only bought food and cooked for herself; the husband cooked his own food. They spoke to each other when they met in the house, but they did not meet every day. The husband never used the sitting-room. The wife, against the husband's wishes, made the husband's bed and tidied his room. They were not living as one household, but as two separate households. The husband was willing to pay his wife maintenance under the order of February 3 only if she left the house.

The wife applied to justices for an order ordering her husband to pay her maintenance which she alleged to be due under the order of February 3, and the justices heard that application on March 10, 1949. The justices held that the facts in the present case were similar to those in *Evans* v. *Evans* (1), a decision of the Divisional Court, but that they were not able to follow that decision in view of criticism of it in *Hopes* v. *Hopes* (2), a decision of the Court of Appeal; that the wife was not "residing with" the husband within the meaning of s. 1, sub-s. 4, the Summary Jurisdiction (Separation and Maintenance) Act, 1925 (3);

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(1) [1948] 1 K. B. 175.

(2) [1949] P. 227.

(3) Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1, sub-s. 1: "An application by a married woman for [a maintenance order] under the Summary Jurisdiction (Married Women) Act, 1895, ... on the ground of cruelty or neglect by her husband, may be made notwithstanding that the cruelty or neglect complained of has not caused her to leave and live separately and apart from him . . . ." Sub-section 4: "No [such] order shall be enforceable and no liability shall accrue under any such order whilst the married woman with respect to whom the order was made resides with her husband, and any such order shall cease to have effect if for a period of three months after it is made the married woman continues to reside with her husband."

Section 2, sub-s. 2: "Where a married woman with respect to whom [such] an order has been made . . . . resumes cohabitation with her husband after living apart from him . . . . the order shall cease to have effect on the resumption of such cohabitation . . . ."

and that the husband was therefore liable to pay 6*l*. arrears of maintenance.

They made an order accordingly.

The husband appealed.

Jellinek for the husband.

The wife did not appear and was not represented.

LORD GODDARD C.J. The question which arises in the present case is exactly the same as that which arose in this court in *Evans* v. *Evans* (1). When the present case was before the justices their attention was called to that case and also to the criticisms which Denning L.J. had directed against that decision in *Hopes* v. *Hopes* (2), a decision of the Court of Appeal. The justices came to the conclusion that they ought to follow the dicta of Denning L.J. and felt that they could not follow *Evans* v. *Evans* (1) in view of the criticisms which he had delivered in *Hopes* v. *Hopes* (2). But, while I can well understand the justices taking that view, I have to point to them that *Evans* v. *Evans* (1) was not overruled by the Court of Appeal in *Hopes* v. *Hopes* (2), and that that part of the judgment of Denning L.J. in that case in which he criticized the decision in *Evans* v. *Evans* (1) was entirely obiter. It was unnecessary for the decision of the case, and the other two members of the court, Bucknill L.J. and Harman J., did not mention *Evans* v. *Evans* (1) at all.

The decision in *Hopes* v. *Hopes* (2) was that while de facto separation, which (with animus desertendi) is an essential element of desertion, can exist even while the parties are under the same roof, there can be no such separation until husband and wife cease to share one household and set up two households. On the facts in that case the court held that there had been no de facto separation and that there was therefore no desertion of the wife by the husband.

I do not propose in the present case to canvass the question whether or not, if the parties were before a court which had jurisdiction in the matter, the court would, on the facts proved, come to the conclusion that there was desertion or no desertion. In *Evans* v. *Evans* (1), which, as I say, still stands, not having been overruled, the court assumed for the purpose of their judgment that it was possible that in the Divorce Court it would have been held, on the facts

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(1) [1948] 1 K. B. 175.

(2) [1949] P. 227, 237, 238.

1949

WHEATLEY
v.
WHEATLEY.

Lord Goddard C.J.

of the case, that there had been desertion. I said (1) in delivering the judgment of the court: "I am willing to assume "in this case that if these facts came de novo before the "Divorce Division, it might, and perhaps would, be held "that the husband had deserted the wife." What the court had to do in that case was to construe not the Matrimonial Causes Act, 1937, but the Summary Jurisdiction (Separation and Maintenance) Act, 1925.

As I have already explained both in *Evans* v. *Evans* (2) and *Thomas* v. *Thomas* (3), before the Act of 1925 was passed a married woman could not obtain a maintenance order against her husband, or apply to the justices for a separation order, unless she had left him, and there was no case to be found in the books in which a married woman had ever gone to justices, or it had ever been held that she could go to justices, and say that she desired a maintenance order while she was still living under the same roof as her husband. That was thought to be a hardship because it might very often happen that a married woman could not afford to quit the home where she was living with her husband until she had a maintenance order against him, because she would have no means of supporting herself. The Act of 1925 therefore amended the law and enabled the wife to apply for a maintenance order although she had not been forced to leave her husband and live separately and apart from him. Section 1, sub-s. 1, of the Act provided that an application might be made for a maintenance order notwithstanding that the wife had not left and was not living apart from her husband. At the time when that Act was passed the only case, or at any rate, the only recent case, in which the present matter had ever been mooted at all was *Jackson* v. *Jackson* (4), to which Denning L.J. called attention in *Hopes* v. *Hopes* (5). In *Jackson* v. *Jackson* (4), Hill J. had thrown out, what was after all a very guarded expression, in which he said (6): "There may be desertion though the husband continues to "live under the same roof with the wife, but in such case "the facts must be very strong." Therefore, when the Summary Jurisdiction (Separation and Maintenance) Bill was before Parliament in 1925, this part of the law, which has been much developed by later decisions, had hardly been the subject of debate in the courts at all.

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(1) [1948] 1 K. B. 175, 178.
(2) Ibid. 178, 179.
(3) [1948] 2 K. B. 294, 298, 299.
(4) [1924] P. 19.
(5) [1949] P. 227, 237, 238.
(6) [1924] P. 19, 26.

1949

WHEATLEY
v.
WHEATLEY.

Lord Goddard C.J.

Section 1, sub-s. 4, of the Act of 1925 provided that a separation order should not, however, be enforceable while the wife resided with her husband. It seemed to the court which decided *Evans* v. *Evans* (1) that the reason why Parliament put in that provision was that it would be undesirable for a married woman to go to a court and get an order against her husband, either with or without a separation clause, to maintain her, and at the same time to go on living in her husband's house. By so doing she would be getting a benefit twice over, because money received under a maintenance order is supposed to be to pay for the wife's board and lodging while she is living separately from her husband, and she would be getting her lodging by still remaining with him. But, apart from that, it would seem most undesirable that spouses should be living in the same house under such circumstances. For myself I can conceive of nothing that is more likely to lead to assaults and general unhappiness and, very often, to actual attempts to eject the wife from the house by violence, than that a wife who has obtained an order against her husband, perhaps after a bitter contest before the justices, should go back and live in the same house with him. We thought in *Evans* v. *Evans* (1), and I still think, that the legislature was providing for such a state of affairs when it enacted that an order should only take effect when the wife left her husband. By s. 1, sub-s. 1, of the Act she had been given the privilege of applying for an order before she left her husband. We thought, and as I say, I still think, that s. 1, sub-s. 4, means that it shall not take effect until the wife has left the husband. That view was reinforced, in our view, by s. 1, sub-s. 2, which provides that an order shall cease to have effect if the wife resumes cohabitation with her husband. In that sub-section the Act does not use the expression "reside"; it uses the expression "cohabitation": and it does not require a lawyer to understand the difference between cohabitation and residence. The cohabitation of two people as husband and wife means that they are living together as husband and wife, the wife rendering wifely services to her husband; the husband rendering husband-like services to his wife. They must live together not merely as two people living in one house, but as husband and wife. I cannot for myself believe that the draftsman of the Act meant the same thing when he used

(1) [1948] 1 K. B. 175.

1949

WHEATLEY
v.
WHEATLEY.

Lord Goddard C.J.

the words "reside with" in s. 1, sub-s. 4, as he meant when he used the word "cohabitation" in s. 2, sub-s. 1.

I have looked at *Hadley* v. *Perks* (1), to which Denning L.J. referred in *Hopes* v. *Hopes* (2), in which it is true that Blackburn J. said (3): "It has been a general rule for drawing "deeds and other legal documents from the earliest times, "which one is taught when one first becomes a pupil to a "conveyancer, never to change the form of words unless "you are going to change the meaning, and it would be as "well if those who are engaged in the preparation of Acts "of Parliament would bear in mind that that is the real "principle of construction. But in drawing Acts of Parliament, "the legislature, as it would seem, to improve the graces of "the style, and to avoid using the same words over and "over again, constantly change them; and accordingly in "s. 24 [of the Metropolitan Police Court Act, 1839 (2 & 3 "Vict., c. 71)] we have 'having in his *possession* or conveying "'in any manner anything,' whereas the words in s. 66 "[of the Metropolitan Police Act, 1839 (2 & 3 Vict., c. 47)] "were 'having or conveying.' I think, however, that the two "expressions were intended to mean the same thing. 'Having "'in his possession' may have perhaps have been introduced "to meet the case of the person who arrested the man when "he came to offer the goods for sale or pledge. But 'having "'or conveying' I think must be limited, making the one "co-extensive with the other, and confining it to 'having' "ejusdem generis with 'conveying'."

With great respect, I do not think that what that learned judge was saying in that case, that one very often finds, or may find, Parliament using different words to express the same thing in different provisions, can be applied to a case such as the present one, where one section of an Act of Parliament talks of a wife who "resides" with her husband and another section talks about "cohabitation" by a wife with her husband, which is a word which, as between husband and wife, has a well-known meaning and a meaning far less wide than the expression "residing" with.

Section 2, sub-s. 2, of the Act obviously contemplates, as it seems to me, a wife going back to her husband in view of a reconciliation, because unless there is a reconciliation how can there be cohabitation? If the wife having obtained her

(1) (1866) L. R. 1 Q. B. 444.
(2) [1949] P. 227, 237.
(3) L. R. 1 Q. B. 444, 457.

order and having left her husband so that the order became effective was taken back by her husband so that cohabitation between the spouses was resumed, the state of affairs would be materially altered. Section 2, sub-s. 2, provides that the order should then come to an end.

It was suggested by Denning L.J. in *Hopes* v. *Hopes* (1) that the effect of *Evans* v. *Evans* (2) (if the decision was right), would be that a woman, having obtained an order, would only have to leave the house for a day or two, and then come back. He said: "If Mrs. Evans, instead of getting back straight "through the window, had stayed away a few nights so as "to be able to say she had been 'living apart' from her "husband, she would apparently have been able to enforce "her order just as Mrs. Thomas [in *Thomas* v. *Thomas* (3)] "did: but because she had nowhere else to go, she could not. "It is impossible to suppose that the legislature intended "such a result." With respect, I will deal with that case when it arises: I do not think it does arise now. I think that by s. 1, sub-s. 4, Parliament meant to provide for the case where the husband and wife were physically living under the same roof; and that by s. 2, sub-s. 2, they meant to provide for the case where the husband and wife were living together as husband and wife and were cohabitating.

At any rate, *Evans* v. *Evans* (2) has not been overruled, and it is therefore the duty of the justices to follow that decision unless and until it is overruled. If that case comes directly before the Court of Appeal in some way, and the Court of Appeal overrules it, this court will loyally follow the decision of the Court of Appeal, even although it may have come before them in a divorce case. If the Court of Appeal, as a court, had said that *Evans* v. *Evans* (2) was wrong, the position would have been different, but at present that case has not been overruled by the Court of Appeal. The position is merely that one member of the Court of Appeal has expressed disapproval of the case, and that that expression of disapproval was obiter. For myself, I confess that at the moment I am unrepentant. I think the decision in *Evans* v. *Evans* (2) was right. It has not been overruled, and therefore the appeal in this case must be allowed.

OLIVER J. I entirely agree, and have nothing to add.

(1) [1949] P. 227, 236.
(2) [1948] 1 K. B. 175.
(3) [1948] 2 K. B. 294.

1949

WHEATLEY
v.
WHEATLEY.

Stable J.

STABLE J. I agree; but, in deference to the decision of the justices, I should like to add just a few words. From experience I know that justices sometimes regard it as a reflection on themselves when this court reverses a decision of theirs, but, so far from that being the case in the present case, I am bound to say that I am struck by the great care and attention which the justices gave to this matter, and by the intelligent appreciation which they gave to the reported cases which were brought to their notice.

It can hardly be wondered that the justices were led into error considering that in *Hopes* v. *Hopes* (1), Denning L.J. said, speaking entirely obiter: "Faced with this choice, I am of "opinion that *Evans* v. *Evans* (2) was wrongly decided . . . . "Relieved of . . . . *Evans* v. *Evans* (2) the law becomes "consistent on this subject."

I might add that it may be that the law is not always wholly logical, but neither is human behaviour, and the law is much more closely concerned with human behaviour than it is with logic. If human behaviour ceases to be logical, then the law has to keep pace with human behaviour, such as it is, and not as it would be in a logical world.

So far as the present question is concerned, I find it impossible to take the view that the phrases "cohabitation" in s. 2, sub-s. 2, of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, and "resides with" in s. 1, sub-s. 4, refer to one and the same state of affairs, because, whereas the consequence of resumption of cohabitation is that by s. 2, sub-s. 2, the order immediately ceases to be of any effect and permanently expires, the effect of residing with is only, by s. 1, sub-s. 4, to suspend the operation of the order during the period of residence. It is only if that residence lasts for three months that the order expires, which shows, it seems to me, beyond discussion that the two phrases must bear a totally different meaning. With that in mind, if I may respectfully say so, not only is the decision in *Evans* v. *Evans* (2) binding on this court, but I agree with it.

Appeal allowed.

Solicitors: *Robbins, Olivey and Lake, for Hill and Abbott, Chelmsford.*

(1) [1949] P. 227, 238. (2) [1948] 1 K. B. 175.

R. P. C.

BRADDOCK v. TILLOTSON'S NEWSPAPERS LD.

C. A.

1949
June 20, 21, 22.

Tucker, Cohen, and Singleton L.JJ.

Evidence—Practice—Appeal—Application for leave to recall witness for re-examination as to credit—Discretion of court—Exercise thereof—R. S. C., Or. 58, r. 4.

On appeal in a suit for libel the plaintiff asked leave to recall the defendants' principal witness for cross-examination as to credit.

Held, that the practice of the courts had been to confine the admission of fresh evidence on appeal to evidence relating to an issue in the case, or at any rate to an issue which could or might be raised on a new trial of the action, and to evidence which, if believed, either would be conclusive or would lead to the reasonable probability that the verdict would have been different. Assuming that the Court of Appeal had power under Or. 58, r. 4, to order the recall of a witness for cross-examination as to credit, it was a power which should be exercised sparingly and only in very special circumstances. In the present case there was no certainty that the fresh evidence sought to be adduced would have led to a different result in the court below, and the Court of Appeal would not be justified in setting what might be a dangerous precedent.

APPEAL from Lord Goddard C.J.

On May 1, 1947, the defendants published in their newspaper, the "Bolton Evening News," an article which purported to describe the proceedings in the House of Commons on the report stage of the Transport Bill, when a large number of amendments were disposed of without discussion under the guillotine procedure and the official opposition walked out of the Chamber in protest. The article, which was based on a report by a Press Agency reporter, was headed "Revelry "by Night," and was as follows: "In the middle of this "unlovely burlesque, Mrs. Braddock, who represents the "Exchange Division of Liverpool, danced a jig on the floor "of the House, finishing in the seat vacated by Mr. Churchill, "our greatest House of Commons man. The whole performance "was nauseating, a sorry degradation of democratic "government by discussion, the nadir, let us fervently hope, "of this Parliament."

The plaintiff, who alleged that the words were meant and were understood to mean that she had behaved in an undignified and unseemly manner, and that she had thereby been damaged in her reputation and held up to ridicule and contempt, claimed damages for libel, but her action was dismissed, the

C. A
1949
BRADDOCK
v.
TILLOTSON'S
NEWSPAPERS
LD.

jury finding that the words complained of were fair comment. Subsequently the plaintiff applied to the court for leave to recall the reporter—on whose description of the proceedings in Parliament the article was based and who was said to be the principal witness for the defence—in order that he might be cross-examined as to credit. The Lord Chief Justice adjourned the application for determination by the Court of Appeal on the appeal.

Paget K.C. and *Harold Lever* for plaintiff. It is desired to put to the witness Bradley some nine convictions, involving dishonesty, over a period of ten years. There would appear to be no case such as this in which an application to admit fresh evidence going to credit has been granted by the Court of Appeal, but in *Rex* v. *Hamilton* (1), such an application was granted by the Court of Criminal Appeal. It is submitted that the Court of Appeal also has the power, and having regard to the importance of Bradley's evidence, should, in the exercise of its discretion grant the plaintiff's application. It is not suggested that the court should lay down a hard and fast rule.

Sir Walter Monckton K.C. and *Milmo* for defendants. It would be a departure from practice under Or. 58, r. 4 of the Rules of the Supreme Court (2) for a witness to be recalled, not in order to give fresh material evidence on an issue in the case, but for re-examination as to credit. Whatever the meaning of "questions of fact" in Or. 58, r. 4 the practice has been to confine the evidence given on recall to questions of fact relevant to the issue. Evidence as to Bradley's convictions is not relevant to any issue in the case. Criminal cases are distinguishable from the present case. In any event in *Rex* v. *Hamilton* (1), the witness was recalled, at the instance of the court, with regard to matters about which he had given evidence at the trial.

[*Robinson* v. *Smith* (3), *Brown* v. *Dean* (4), and *Rex* v. *Copestake* (5) also referred to.]

TUCKER L.J. having delivered a judgment dismissing the appeal in the action, continued: I pass now to the second

(1) (1917) 13 Cr. App. R. 32.

(2) R. S. C., Or. 58, r. 4: "The Court of Appeal shall "have . . . . full discretionary "power to receive further evidence "upon questions of fact . . . . "by oral examination in "court . . . ."

(3) [1915] 1 K. B. 711.

(4) [1910] A. C. 373.

(5) [1927] 1 K. B. 468.

C. A

1949

Braddock
v.
Tillotson's
Newspapers
Ld.

Tucker L.J.

and, in my view, more important aspect of the case, namely, the application made by the plaintiff to recall the witness Mr. Bradley, who was undoubtedly the most important witness for the defendants, in order that certain questions might be put to him by way of cross-examination. It appears, in my judgment—I am, of course, assuming, and it is purely a matter of assumption—that if this witness were recalled and these matters were put to him, that he would have admitted the accuracy of them, or that failing such admission, the plaintiffs would have established them as facts. An affidavit has been put in, and what it amounts to is this: it is an affidavit by the plaintiff's solicitor, and he refers to the fact that Mr. Bradley was called as a witness at the hearing, and that it was on his report—he was the representative of a news agency—that the article in the defendants' paper was based. He was a parliamentary reporter, and the plaintiff's solicitor says in his affidavit: " I am myself a Member of Parliament " and I knew that the said Harold Douglas Bradley was in " fact so employed, but I did not know him personally. Until " the hearing of the action, and for long afterwards, " I had no reason to suppose that the said Harold Douglas " Bradley was not a person of good character, fit to be a member " of the Press Gallery. I am informed, and verily believe, " that some time after the said hearing the appropriate authori- " ties of the House of Commons, acting in certain cir- " cumstances reported to them and upon information received, " had withdrawn permission for the said Harold Douglas " Bradley to be a member of the Press Gallery. This informa- " tion reached me some four weeks ago. I thereupon caused " inquiries to be made. I am now informed, and verily believe, " that the said Harold Douglas Bradley is a person who has " been many times convicted, over a period of many years, of " stealing and other offences involving dishonesty, and that " there are recorded eight or nine such convictions, the earliest " in December, 1935, and the latest in December, 1948." This trial took place on November 11, 1948, so that the conviction in December, 1948, could not in any event have been put to him at the trial. Furthermore, I would point out in passing that this affidavit does not state the precise dates upon which these convictions took place, so one does not know whether or not, if this witness served in the Army, these convictions were all before, or how many of them were before,

BIBL. LONDIN UNIV.

C. A.

1949

BRADDOCK v. TILLOTSON'S NEWSPAPERS LD.

Tucker L.J.

the period of his service in the Army, or whether some were current. However, I only mention that in passing.

The application is made pursuant to Or. 58, r. 4, which reads as follows: "The Court of Appeal shall have all the "powers and duties as to amendment and otherwise of the "High Court, together with full discretionary power to receive "further evidence upon questions of fact, such evidence to be "either by oral examination in court, by affidavit, or by "deposition taken before an examiner or commissioner. "Such further evidence may be given without special leave "upon interlocutory applications, or in any case as to matters "which have occurred after the date of the decision from which "the appeal is brought. Upon appeals from a judgment "after trial or hearing of any cause or matter upon the merits, "such further evidence (save as to matters subsequent as "aforesaid) shall be admitted on special grounds only, and "not without special leave of the court."

It has been the invariable practice of the Court of Appeal in this country to confine the admission of fresh evidence, in circumstances such as this, to evidence which could not reasonably have been discovered before the trial, and to evidence which, if believed, either would be conclusive or, as has been said by some judges, to evidence which would lead to the reasonable probability that the verdict would have been different. But the practice has hitherto been confined to evidence relating to an issue in the case, or at any rate to an issue which could and might yet be raised if there were a new trial in the action. No case has been cited in which this court has ever admitted or has ever been asked to admit evidence going to credit only. That, of course, is not conclusive; it is certainly not conclusive as to the jurisdiction of this court and, for myself, I think that this court clearly has jurisdiction to take any course which it thinks fit with regard to a matter of this kind; but the invariable practice is clear, and furthermore, when one comes to apply the first test, namely, whether the evidence could have been discovered by reasonable diligence before the trial, that language is really hardly applicable to evidence of this kind, because in the ordinary normal events a solicitor or a client would not be expected, in the absence of unusual circumstances, to go rummaging about, if I may so call it, into the past records of any witness he may think was to be called. In fact, generally speaking, he would not know who the witnesses were who were going to be called. In this particular case it so happens that, owing to the necessity for petitioning the House of Commons with regard to these witnesses, in the course of what took place in the House of Commons the plaintiff's solicitor did become aware of the name of the witness a week or so before the trial. So it is possible, I suppose, if inquiries had been made, that this would have been found out. But I do not think it is reasonable, with regard to a man in this position, that any inquiries should be made; I am only saying that what has always been regarded as the test—the essential test, namely that the evidence could not have been obtained by reasonable diligence—is hardly applicable to a case of this kind.

I think there is no doubt, as I have already indicated, that the evidence of this witness Bradley was the high water mark of the defendants' case—as to that there can be no question. It is for us to decide what course we should take in this matter, having regard to what has been the invariable practice of the court in the past. There has been some variation in the language used by judges as to the quality of new evidence required by the court, before it shall be admitted, namely, whether it must be such as is presumably to be believed, and if believed would be conclusive; or that it is sufficient if there is a reasonable possibility that, if brought before the jury, a different verdict would have been given. In the case of *Brown* v. *Dean* (1), Lord Loreburn L.C., said this: "My Lords, "the chief effect of the argument which your Lordships have "heard is to confirm in my mind the extreme value of the old "doctrine 'Interest reipublicae ut sit finis litium,' remembering "as we should that people who have means at their command "are easily able to exhaust the resources of a poor antagonist. "With great respect for the authority of Fletcher Moulton L.J., "I am of opinion that the order of the Divisional Court, "confirmed by the majority of the Court of Appeal, is perfectly "right. When a litigant has obtained a judgment in a court "of justice, whether it be a county court or one of the High "Courts, he is by law entitled not to be deprived of that "judgment without very solid grounds; and where (as in "this case) the ground is the alleged discovery of new evidence, "it must at least be such as is presumably to be believed, and "if believed would be conclusive." With regard to that, Lord Atkinson concurred; Lord Shaw, however, said: "My

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(1) [1910] A. C. 373, 374.

C. A.

1949

Braddock
v.
Tillotson's
Newspapers
Ld.

Tucker L.J.

"Lords, I concur, but I hope your Lordships will forgive me "for expressing doubt upon a single point, and it is not really "material to the judgment which has just been pronounced. "It is upon the subject of res noviter veniens ad notitiam. "Speaking for myself, I do not at present see my way to go the "whole length of the proposition my noble and learned friend "the Lord Chancellor has proposed, to the effect that the "res noviter veniens must, if believed, be conclusive. It is "possible to figure cases in which it might be so gravely "material and so clearly relevant as to entitle the court to "say that that material and relevant fact should have been "before the jury in giving its decision."

In *Rex* v. *Copestake* (1), Lord Hanworth M.R., after referring to the case of *Brown* v. *Dean* (2), and the speeches of the Lord Chancellor and Lord Shaw, said this, after quoting the speech of Lord Loreburn: "That statement "was not accepted by Lord Shaw, but the other learned "Lords agreed with the Lord Chancellor, and the result of "it would be that only such fresh evidence could be produced "as would satisfy those conditions. That evidence must be "of such a character that not merely is it relevant but of such "importance that it would have affected the judgment of the "tribunal if it had been before them at the original hearing "of the case." Scrutton L.J. was inclined to the view of Lord Shaw; he said at page 477: "If, however, the justices "had been entitled to reopen the question of paternity, then "I think I should have held that there was fresh evidence of "a kind enabling them to do so. In *Nash* v. *Rochford Rural* "*Council* (3) the question of admission of fresh evidence was "before this Court, and we followed the rule laid down by "Lord Chelmsford in *Shedden* v. *Patrick* (4), and stated it "in much the same way as Hill J. stated it in *Timmins* v. "*Timmins* (5), to the effect that the evidence to be admitted "must be of such importance as very probably to influence the "decision. It seems to me that we in this court have not got "so far as the full extent of Lord Loreburn's dictum in *Brown* "v. *Dean* (2), that the new evidence must be of such a character "that it is 'presumably to be believed, and if believed would "'be conclusive,' but I think we have clearly decided that "it must be of such weight as, if believed, would probably "have an important influence on the result."

(1) [1927] 1 K. B. 468, 474.
(2) [1910] A. C. 373.
(3) [1917] 1 K. B. 384.
(4) (1869) L. R. 1 H. L. Sc. 470, 545.
(5) [1919] P. 75.

That is how the matter stands ; there has been that variation in the language used by the learned judges on this point. These varying expressions have, so far as the decisions of the courts in this country are concerned, always been directed to evidence directly relevant to the main issue in the action, or to some issue which could, or would, have been raised at the trial if the evidence had been discovered. It is not necessary in this case to express any opinion as to which is the better view with regard to the quality of the evidence in such a case. If, however, this court is to depart from its invariable practice of confining such evidence to the relevant issues and is to admit fresh evidence directed solely to credit, I am of opinion that such a course would, if ever, only be justified where the evidence is of such a nature and the circumstances of the case are such that no reasonable jury could be expected to act upon the evidence of the witness whose character had been called in question. It would, in my view, be wrong for this court to admit fresh evidence directed solely to credit, merely because there is a possibility, or merely a reasonable probability, that such evidence would result in a different verdict. There are two conflicting principles always operating in these matters ; one is that everything should be done in order to ascertain the truth ; the other is that there should be some finality in litigation, and, so far as possible, a reasonable limitation of costs. It is in order to achieve the latter result that it is necessary for the court to impose some limit to the reopening of decided issues, even at the risk that injustice may result, or it may appear that there is a possibility of injustice resulting.

We have been referred to *Rex* v. *Hamilton* (1), and this is the case principally relied upon—in fact, it is the only case relied upon—by Mr. Paget. In that case, in which the appellant had been convicted of receiving stolen property and of being an accessory after the fact to larceny, a witness called Jarvis had at the trial described himself as a motor engineer, and said that he had an establishment of his own in Edgware Road, and that he had been trained at Wembley. He appears to have volunteered, or to have been asked that in chief, and that was the evidence which he had given at the trial. Then he was cross-examined on those matters, and he said that his business was carried on under the name of Jarvis & Co. ; he gave the address ; he said that it was a limited company in the hands of his family ; he was the managing director; the capital was £500; the business was established three years ago, and so forth, giving particulars of the ages of his children and the shares which they held. The application made in the Court of Criminal Appeal was to recall that witness, in order that he might be cross-examined for the purpose of showing that his name was not Jarvis, but Jacobs, and that he had no business at the address which had been given. That application was acceded to, and ultimately the court quashed the conviction on the ground of misdirection at the trial. The case contains no intimation or indication of precisely upon what principles that course was taken, but it is to be observed that the course was taken pursuant to the special provisions in s. 9 of the Criminal Appeal Act, 1907. I need not refer to that, but it gives the most complete and most absolute power to the Court of Criminal Appeal to allow the calling of evidence, or to call evidence on its own initiative, in the widest possible terms; and the powers conferred upon the Court of Criminal Appeal are expressly stated to be additional to the power to exercise all the ordinary powers of an appellate court in civil matters. It was pursuant to that that the evidence was admitted. I do not think it can form any precedent at all for this court. Furthermore, although learned counsel described the evidence as going to credit only, which was in a sense true, it was for the purpose of challenging the accuracy of statements of fact which the witness had made at the trial. Furthermore, as was pointed out by Singleton L.J. in the course of the argument, the object, the desire, or the principle that in these matters there should be some finality in litigation, does not apply quite in the same way in criminal cases. There the aim is to see that in any event an innocent man shall not be convicted; that is the principal object. With that end in view, it may well be that it is proper to take a course which would not be appropriate in a civil case, which is a contest between two parties, and with regard to which the practice in the courts is, so far as possible, to keep the extent of the litigation reasonably within bounds.

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(1) (1917) 13 Cr. App. R. 32.

For those reasons I think that the application to recall this witness for cross-examination must also fail. I would only add that in applying the test that I have adumbrated, as being that which the court may possibly think right to take in other cases, it seems to me quite impossible to say in this case that if these questions had been put to this witness and admitted, no reasonable jury could possibly have acted on his evidence.

One does not know what view the jury might take in the case of a man who, when questions of this kind are put to him, may possibly frankly admit them and square up to them—the putting of questions of this kind sometimes reacts to the detriment of the party who puts them—and the jury would have to consider whether they thought that the fact that a man had been convicted of dishonesty necessarily made him an inaccurate reporter of what he had seen in the House of Commons on an occasion some time before the trial. It seems to me quite impossible to say what view the jury might have taken in those circumstances, but I do not hide from myself for one moment that this witness was a very important witness to the defendants.

COHEN L.J. I am of the same opinion, and I find myself in such general agreement with what has fallen from the lips of my Lord, that I only desire to deal with two points. [His Lordship rejected plaintiff's counsel's criticism of Lord Goddard's summing up and continued :] The second point, arising out of the summons to adduce further evidence, has given me greater difficulty. I think we must recognize that Mr. Bradley's evidence must have had considerable influence, though not necessarily conclusive influence, on the minds of the jury, and it is possible that they would have reached an opposite conclusion to that which they did reach, had he been cross-examined and had he admitted the truth of the allegations referred to in Mr. Silverman's affidavit ; but I agree with my Lord that it does not necessarily follow that this would have been the result. This application is, as Mr. Paget frankly admitted, so far as this court is concerned, without precedent, and I think we should be dangerously extending the ambit of cases in which the powers conferred by Or. 58, r. 4, ought to be exercised, if we were to allow Mr. Bradley to be recalled and cross-examined as to credit. When I say " without precedent," I am not overlooking the case in the Court of Criminal Appeal, which was referred to by Mr. Paget, *Rex* v. *Hamilton* (1), to which my Lord has already referred ; but I agree with my Lord that the case is different in two material respects. First, the evidence which it was sought to adduce in that case as to credit was evidence disproving facts alleged at the trial ; and secondly, there is a radical

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(1) 13 Cr. App. R. 32.

C. A.
1949
BRADDOCK
v.
TILLOTSON'S
NEWSPAPERS
LD.
——
Cohen L.J.

distinction between criminal and civil cases. In civil cases the interest of the republic is "ut sit finis litium"; whereas in criminal cases the dominant and paramount interest is that an innocent man should not be pronounced guilty. It was no doubt for this reason that the Crown, in *Hamilton's* case (1), did not seek to oppose the application to have the witness recalled for cross-examination, and I think that if this court is to extend the ambit of cases in which it allows further evidence to be adduced on appeal to include the cases where the further evidence is directed only to the credit of a witness called at the trial, it can, if it be right at all, only be right to do so in a case where the court is satisfied that the additional evidence *must* have led a reasonable jury to a different conclusion from that actually arrived at in the case.

I find it impossible to say that that state of affairs is established in the case before us, and for those reasons I agree that the appeal fails, and that the application to adduce further evidence should be dismissed.

SINGLETON L.J. I am of the same opinion, and I think it right to add a few words in regard to the application under Or. 58, r. 4. Under that rule the Court of Appeal has full discretionary power to receive further evidence on questions of fact. The plaintiff here seeks leave to offer additional oral evidence, in that she wishes her counsel to be allowed to cross-examine one Bradley as to credit. Bradley gave evidence for the defendants. At that time the plaintiff's advisers had not the information which they have since obtained, and they now wish to ask him questions as to his character and, if necessary, they ask to be allowed to call a police officer to produce the record of Bradley, who is said to have been convicted on a number of occasions of stealing, or of offences involving dishonesty. The object of this is to support the plaintiff's application that the verdict and judgment in favour of the defendants be set aside, and that a new trial be had between the parties. It is not often that the Court of Appeal grants an application that further evidence be heard. The principles on which the court acts are set out in the authorities, to three of which we have been referred. So far as one can find, there is no record of any application for the recalling of any witness so that he may be cross-examined as to his credit.

(1) 13 Cr. App. R. 32.

The reason for this may well be that it cannot lead to any finality; it is not relevant to any issue; it does not establish any fact which is an issue between the parties to the litigation. It is impossible to say in a particular case how much importance the jury attach to the evidence of one witness when there are others, and it cannot be said, positively, or with any degree of certainty, that the verdict would have been a different one if the jury had found that a particular witness had been convicted of some offence or offences. Under Or. 58, r. 4, power is given to this court to receive further evidence upon questions of fact. Prima facie, that means on questions of fact material to an issue in the action. Assuming that the court has power to order the recall of a witness for the purpose of his being cross-examined as to credit, it is clear that that power should be exercised sparingly and only in very special circumstances. I do not regard this as a case in which the court, in its discretion, ought to make such an order; it leads nowhere; there is no finality about it. If the court were to make the order asked for, it would be a departure from the well-recognized practice of the court, and it would lead to countless applications in other cases. This may appear to be a hardship upon Mrs. Braddock, but she is in the same position as any other litigant, and her case must be dealt with in just the same way as theirs—she would not have it otherwise. *Rex* v. *Hamilton* (1), was cited by Mr. Paget in support of his application. I do not regard that as an authority covering this sort of case in this court. There the main attack was upon the direction given by the trial judge to the jury, and that attack succeeded, after the court had examined fully into the facts. During the argument, on the submission of counsel for the appellant, it appeared that a witness for the prosecution had given some evidence which the defence—the appellant—was then in a position to say was false, and counsel asked for leave to call evidence to show that. It was from the court that the suggestion came that that witness might be recalled, and the court drew attention to the powers given to the Court of Criminal Appeal under s. 9, sub-s. (*b*), of the Criminal Appeal Act of 1907, and, as one can well understand, no objection was taken by counsel for the Crown.

The circumstances here are quite different, and I can find no reason in this case for departing from what has always been,

(1) 13 Cr. App. R. 32.

C. A.

1949

BRADDOCK
v.
TILLOTSON'S
NEWSPAPERS
LD.

so far as one can find, the practice of this court. In those circumstances I agree that the appeal and the application must both be dismissed.

Appeal and application dismissed.

Solicitors for plaintiff: *Silverman & Livermore, Liverpool*
Solicitors for defendants: *Oswald Hickson, Collier & Co.*

A. W. G.

C. A.

1949

June 27, 28;
July 8.

Tucker,
Cohen and
Singleton L.JJ.

THE KING *v.* ST. PANCRAS BOROUGH ASSESSMENT COMMITTEE. *Ex parte* THE RAILWAY EXECUTIVE.

Rating — Provisional Valuation list — Railway hereditament — Local Government Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *ss.* 85, *sub-s.* 1, *and* 89, *sub-s.* 5 (*b*).

Premises which up to 1941 had been in the occupation of a railway company and had been entered in the local rating authority's valuation list as a railway hereditament, in accordance with the procedure provided by the Railways (Valuation for Rating) Act, 1930, were then requisitioned by the Government and after prolonged negotiations were entered in the supplemental valuation list for 1946 as being occupied by the Crown, the contributions made in lieu of rates in respect thereof being also entered. When the Crown's occupation ceased in June, 1947, the railway resumed occupation, and on April 5, 1948, the Local Government Act, 1948, which repealed the Railways (Valuation for Rating) Act, 1930, having by that time come into operation, the rating authority made a provisional valuation list, in which they inserted the name of the Railway Executive as occupiers, and the gross and rateable values of the said hereditament as 12,000*l.* and 10,000*l.* respectively. The Railway Executive objected and (the Assessment Committee having confirmed the provisional list) appealed to the Divisional Court, which by order of certiorari quashed the determination of the Assessment Committee. On appeal by the Assessment Committee—

Held, that s. 85 of the Act of 1948 gave general exemption from rating to all railway hereditaments, "save as otherwise "provided in this Part of this Act," and there was nothing in the other sections of Part V (which dealt with the transitional period between the passing of the Act and the coming into force of the new system of rating under Part III) which justified what was admittedly a railway hereditament being entered in the valuation list and made the subject of a demand for rates.

APPEAL from Divisional Court.

Prior to 1941 the hereditament known as Euston House, Eversholt Street, London, was occupied by the London, Midland and Scottish Railway Company, and was entered in the valuation list for the borough of St. Pancras as a railway hereditament, in accordance with the procedure provided by the Railways (Valuation for Rating) Act, 1930. During 1941 the hereditament was requisitioned by the Crown, who remained in occupation until the end of June, 1947. On the termination of the occupancy of the Crown the hereditament reverted to the occupation of the railway company and at all material times since has been in the occupation of the railway company or its successors, the Railway Executive. During the Crown's occupancy the hereditament was not liable to be rated, and it was accordingly entered in the supplemental valuation list for 1946 as being in the occupation of the Air Ministry and Ministry of Supply, and it was also entered in that part of the list in which are shown properties occupied for the purposes of the Crown and exempt from rating, and the contributions made in lieu of rates in respect thereof. The Crown's occupation having ceased at the end of June, 1947, the rating authority on April 5, 1948, made a provisional list in which they inserted the name of the Railway Executive, London Midland Region, as the occupiers, and 12,004*l*. and 10,000*l*. as the gross and rateable values respectively of the hereditament.

On April 1, 1948, Part V of the Local Government Act, 1948, had come into force, and by s. 85 (1) it was enacted that no premises which were or formed part of a railway hereditament should be liable to be rated or to be included in any valuation list or in any rate. The Railway Executive accordingly made objection to the provisional list, and their objection being disallowed by the Assessment Committee, who confirmed the provisional list, they applied to the

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(1) Local Government Act, 1948, s. 85, sub-s. 1: "Save as "is otherwise provided in this "Part of this Act, no premises "which are or form part of either "—(*a*) a railway or canal heredi- "tament (as defined for the "purposes of this Part of this "Act); . . . . shall be liable to "be rated or be included in any "valuation list or in any rate, "and the British Transport Com- "mission . . . . shall, in the year "1948–49 and all subsequent "years, make such payments "for the benefit of local "authorities as are provided for "by the subsequent provisions "of this Part of this Act in lieu "of the rates which would, "apart from the provisions of "this Part of this Act, be payable "to rating authorities in respect "of those hereditaments."

Divisional Court for an order of certiorari to quash the determination of the Assessment Committee. The order of certiorari being granted, the Assessment Committee appealed.

Rowe K.C. and *Squibb* for Assessment Committee. On March 31, 1948, when the Railway (Valuation for Rating) Act, 1930, was repealed by the Local Government Act, 1948, and the Railway Valuation Committee ceased to function, the Railway Executive was in occupation of the whole of these premises and nobody could do anything to get this hereditament back into the valuation list in the proper way as a railway hereditament. It was therefore open to the rating authority, subject to the provisions of the Local Government Act, 1948, to take steps, under the ordinary rule, to enter it in the list as a hereditament occupied by the Railway Executive, at a certain valuation. The question for decision is whether that step is prohibited by the Act of 1948, which came into operation on April 1, 1948. By s. 93, sub-s. 4, of that Act it is provided that instead of ordinary values being inserted in the valuation lists the British Transport Commission shall pay for the benefit of local authorities in England and Wales a lump sum of 1,810,000*l.*, and it is to be presumed that that lump sum was arrived at by a valuation of all the railway hereditaments appearing in the lists on March 31, 1948. Inasmuch as this hereditament did not appear in the railway roll at that date it is to be presumed that its value is not included in the lump sum, and therefore there will be no double rating if the provisional list is approved. It is not disputed that Euston House is a railway hereditament, but even if the Railway Valuation Committee had completed the fourth quinquennial railway roll in time and had directed the rating authority to enter this hereditament in the appropriate part of the list as a railway hereditament, that alteration in the list would have had to be erased under s. 89 (1) of the Act of 1948, which

(1) Local Government Act, 1948, s. 89, sub-s. 5: "Save as "provided in the preceding "provisions of this section, and "without prejudice to the pro- "visions of the next following "sub-section, no alteration shall "be made in any valuation list— ". . . . (*b*) for the purpose of "securing that any other "hereditament in England or "Wales is treated as or as part "of a railway or canal heredita- "ment until the provisions of "Part III of this Act relating "to the alteration of valuation "lists by means of proposals "made by or served on valuation "officers have come into force."

contains a special code for the transitional period. The whole object is to ensure that nothing which was not shown in the ordinary list as a railway hereditament on March 31, 1948, shall be treated as a railway hereditament. That is the test. Clearly the list showing this building as Crown-occupied property was erroneous. It was the duty of the rating authority to take some action to correct the list. The question is: What action? If they had entered the hereditament as a railway hereditament they would have violated sub-s. 5 (*b*) of s. 89 (1). Equally, if they had omitted it altogether by erasing it from the list of Crown-occupied property they would have committed an offence, because that would have been equivalent to treating it as a railway hereditament. The Railway Executive are in effect trying to get the benefit of the Crown's exemption carried on through the transitional period.

Harold Williams K.C., *Colin Pearson K.C.* and *Walter Gumbel* for Railway Executive. Section 85 of the Act of 1948 gives exemption from rating to all railway hereditaments "save as is otherwise provided" in Part V of the Act, and the Assessment Committee claim to find that exception in sub-s. 5 (*b*) of s. 89, which prohibits any alteration in any valuation list for the purpose of securing that any other hereditament is treated as a railway hereditament. The power of the rating authority under the general law must, it is submitted, have extended to removing this particular entry from the list of properties in the occupation of the Crown. If that alteration is made for the purpose of securing that this hereditament is treated as a railway hereditament the rating authority offends against the Act of 1948, but if it is done solely for the purpose of showing that the property is no longer in the occupation of the Crown no violation of s. 89 is committed. The test of its legality is the purpose for which the alteration of the list is made. The rating authority have gone beyond their power under the general law because they have treated a property which is admittedly a railway hereditament and exempt from rating as though it were not a railway hereditament and therefore liable to pay rates. The provisional list brought into rating a property which on the face of it was a railway hereditament, and that is absolutely prohibited by s. 85 unless it can be shown that

C. A.

1949

THE KING v. ST. PANCRAS BOROUGH ASSESSMENT COMMITTEE. *Ex parte* THE RAILWAY EXECUTIVE.

something in Part V. of the Act "otherwise provided." The appeal should be dismissed.

Cur. adv. vult.

July 8. TUCKER L.J., having stated the facts, continued: The question involved in this appeal depends on the proper construction of ss. 85 and 89 of the Local Government Act, 1948. The Railway Executive rely on s. 85 and contend that nothing is to be found in Part V of the Act excluding this hereditament from this general exemption of railway hereditaments. On the other hand the Assessment Committee submit that the sections when read as a whole, and particularly sub-s. 5 (*b*) of s. 89 justify the inclusion of this hereditament in the valuation list and the consequential demand for the payment of rates. [His Lordship then read sub-s. 5 of s. 89 (1) and continued:]

It is common ground that the provisions of Part III of the Act had not come into force on April 5, 1948. It is also common ground that the hereditament in question is a "railway hereditament" as defined by s. 86. It is said by the Assessment Committee that on the departure of the Crown it became their duty under the Valuation (Metropolis) Act, 1869, to see that correct entries were made in the valuation list and that if they altered the list by simply omitting this hereditament altogether they would be infringing sub-s. 5 (*b*), because the only justification for its omission would be for the purpose of its being treated as or as part of a railway hereditament. It is to be noted that on April 1, 1948, when Part V of the Local Government Act, 1948, came into operation, the valuation list in force included the supplemental list of 1946, which showed the Air Ministry and Ministry of Supply as occupiers. On April 1, 1948, the hereditament was in fact a railway hereditament occupied by the Railway Executive. Whence do the Assessment Committee derive their jurisdiction to correct the list and make it accord with the facts where the hereditament is a railway hereditament and as such immune from inclusion in any valuation list by virtue of the opening words of s. 85?

By April 1, 1948, the railway valuation roll for the fourth quinquennial period under the Railways (Valuation for Rating) Act, 1930, had not been completed. The relevant provisions of that Act were repealed on April 1, 1948. Parts of the roll had, however, been completed in certain areas and the necessary alterations consequential thereon had been made in some valuation lists. To deal with this situation s. 89, sub-s. 2, provided that such parts of the roll should be deemed never to have come into force and the consequential alterations in the valuation lists be deemed never to have been made. This must inevitably have resulted in some valuation lists—during the transitional period until Part III of the Act came into force—containing entries which did not correctly represent the true facts. If in the present case the part of the roll applicable to this hereditament had been completed, and the consequential alteration made in the valuation list, the roll would have been deemed never to have come into force and the entry never to have been made. The result would apparently have been that the entry of the Air Ministry would have remained. It would be strange if the result were to be different in cases where the roll has not been completed and no consequential alteration has been made in the valuation list. In such cases there was no need for the legislature to make provision to nullify something that had never taken place. Section 90 makes special provision for hereditaments shown as railway hereditaments on March 31, 1948, but not in fact occupied by the Transport Commission, but I can find no provision for the converse case. The meaning of sub-s. 5 (*b*) of s. 89 is by no means clear but, in my view, having regard to the opening words of s. 85 and the general scheme of this Part of the Act, the sub-section affords no justification for the inclusion of this hereditament in the provisional list, and apart from this sub-section I can find nothing to qualify the general immunity afforded to railway hereditaments by s. 85. For these reasons I would dismiss this appeal.

COHEN L.J. The question for determination on this appeal is whether the Assessment Committee were entitled, having regard to the provisions of the Local Government Act, 1948, to include a hereditament known as Euston House, Eversholt Street, London, in a provisional list, to include the name of the Railway Executive as occupiers of the premises and to demand rates in respect thereof from the Railway Executive. The Assessment Committee on July 29, 1948, approved the inclusion of the hereditament in question in a provisional list, No. 177, dated April 5, 1948, but on January 25, 1949, a Divisional Court granted an order of certiorari quashing the

C. A.
1949
The King v. St. Pancras Borough Assessment Committee. Ex parte The Railway Executive.
Cohen L.J.

determination of the Assessment Committee. From this decision the Assessment Committee appeal. Counsel on both sides agreed that the point was a short one, depending purely on the construction of the Local Government Act, 1948, but, in order to arrive at a determination on it, I think it is necessary to see what the position was before that Act came into force. I start with s. 51 of the Valuation (Metropolis) Act, 1869. Under that section it was the duty of the Assessment Committee to include in the valuation list every hereditament in their area in accordance with the classes mentioned in sch. III to the Act, Class 10 being "Railways "Canals Docks Tolls Waterworks and Gas Works." The form of the valuation list was governed by the London (Valuation Lists) Rules, 1933. The list has to show as regards each hereditament, among other particulars, the name of the occupier and of the owner; it was divided into three parts: (1.) hereditaments other than industrial and freight transport hereditaments; (2.) industrial hereditaments; (3.) freight transport hereditaments. Hereditaments used for railway transport purposes fell, of course, under Part III of the list, but the question whether or not a hereditament could be included in that Part was determined by the Railways (Valuation for Rating) Act, 1930. Under that Act a Railway Assessment Authority was constituted on which was cast the responsibility of preparing, as soon as might be after its constitution and thereafter at intervals of five years, a railway valuation roll showing the net annual and rateable values of every railway hereditament in England. The roll was to be divided into parts and as soon as the authority had determined the rateable values of the several hereditaments occupied by any railway company, they were to complete the part of the railway valuation roll relating to the undertaking of that company. Provision was made for revision of the roll from time to time (see s. 11). The authority were to notify the Assessment Committees of the completion of a part of the roll and s. 12 provided that on receipt of any such notice, the Assessment Committee was to cause the values to be entered in that part of the roll and such other particulars as might be prescribed to be entered in the valuation list in substitution for the values or particulars appearing in that list. "Prescribed" meant prescribed by the Rating and Valuation Act (Railway Valuation Roll) Rules, 1933, which, among other things, required (see r. 12) railway hereditaments to be distinguished by inserting the letter "R" and the number of the hereditament in the roll. After the Act of 1930 came into force, a hereditament could only be included or removed from the list of railway hereditaments as a result of a determination arrived at by the Authority appointed under that Act. The first three rolls required to be prepared under that Act were prepared. The fourth roll should have been prepared and come into force on April 4, 1946, but it had in fact not been completed by the time the Local Government Act, 1948, came into force.

Before I turn to the history of Euston House, I must state briefly the position as regards properties in Crown occupation. So far as hereditaments outside London were concerned, the position was governed by the Rating and Valuation Acts (Form of Valuation List) Rules, 1932, which provided in r. 4 that as regards hereditaments in Crown occupation, in respect of which a contribution was made in aid of rates, they should be entered in one group at the end of that section of Part I of the list which related to the parish in question. We were informed that a similar practice was adopted in London, although there were no Statutory Rules prescribing the adoption of that practice. [His Lordship then stated the facts and continued :]

When the London Midland and Scottish Ry. Co. re-entered into occupation, Euston House should in due course have again been entered in the list as a freight transport hereditament. The Assessment Committee could not, however, make the necessary correction unless and until the railway valuation roll was amended. It was too late to amend the third roll. The matter could have been put right on the fourth roll, but the preparation of that roll was much in arrears. As a result, the Assessment Committee could not for the time being recover rates from the Railway Executive nor could they ask a contribution from the Crown. Had the fourth roll been duly completed and become operative, the matter would have been put right owing to the retrospective effect given to amendments by s. 12, sub-s. 4, of the Act of 1930, but that Act was repealed by the Local Government Act, 1948, and the fourth roll will never be completed.

What, then, is the effect of the Act of 1948? Part III contains a new code for valuation and rating procedure, but it did not come into force on the passing of the Act. Power was given to the Minister of Health by s. 72 to fix the day or days on which it was to come into force. We were told that he has exercised that power and that Part III will come into force on February 1, 1950. Part V, under which the question before us falls to be determined, deals with the rating of transport and electricity authorities.

Mr. Williams was, I think, right in saying that sub-s. 1 of s. 85 confers on railway hereditaments as defined in the Act absolute immunity from rating "except so far as in Part V "itself it is otherwise provided." Section 86 defines a railway hereditament. So far as material it is in the following terms: "In this Part of this Act, except where the contrary is expressly "provided, the expression 'railway or canal hereditament' "means a hereditament occupied for any of the purposes "of the British Transport Commission specified in sub-s. 2 "of this section." There can, I think, be no doubt that the purposes for which the Railway Executive occupy Euston House are "non-rateable purposes" within sub-s. 2 and that as soon as Part III of the Act comes into force it will be the duty of the new rating authority to treat Euston House as a railway hereditament.

Section 87 deals with railway hereditaments partly used for non-rateable purposes and partly for other purposes, and provides that such a hereditament shall not be exempt from rating or from inclusion in a valuation list under s. 85, but shall be included at a fair valuation in respect of its use for purposes other than non-rateable purposes. This, says Mr. Williams, is the section to which reference is intended by the opening words of s. 85, sub-s. 1, and it is the only exception to the exemption conferred by that section. Section 88 repeals the Act of 1930 so far as anything material to this appeal is concerned.

I now come to s. 89, on sub-s. 5 of which Mr. Rowe relies as containing a provision limiting the operation of s. 85, sub-s. 1. Section 89, sub-s. 1, provides that the provisions of Part V, so far as anything material to the decision of this case is concerned, shall come into force on April 1, 1948, except so far as in sub-s. 2 it is otherwise provided. Sub-section 2 provides that the fourth railway roll, which was in course of preparation under the Act of 1930, should not be completed, that any part of the roll which had been completed should be deemed never to have come into force, and that any alterations made in any valuation list as a result of the preparation of the fourth roll should be deemed never to have been made, and the list corrected accordingly. Sub-section 3 in effect provides that until other provision is made under Part III of the Act all hereditaments shown in the valuation lists on March 31, 1948, as railway hereditaments within the meaning of the Act of 1930 should, subject to s. 90, be treated as railway hereditaments for the purposes of Part V unless they were shown in the lists as Freight Transport hereditaments used wholly for purposes which would not be " non-rateable purposes " within s. 86, sub-s. 2. Sub-section 4 provides that hereditaments which under sub-s. 3 were to be deemed railway hereditaments for all purposes were to be omitted from the lists unless they were used partly for purposes other than non-rateable purposes, in which case they were to remain in the list, the net annual value being such net annual value as was shown in the list on March 31, 1948, as attributable to the rateable purposes. The exception to sub-s. 4 thus conforms to s. 87, sub-s. 1.

Sub-section 5 is the corner-stone of Mr. Rowe's argument. This sub-section, as Mr. Williams points out, does not in terms limit in any way the operation of s. 85, sub-s. 1, but Mr. Rowe says that the underlying principle is to stabilize the list of railway hereditaments on March 31, 1948 ; that it was the duty of the Rating Authority to correct the list by deleting the Crown as occupier ; that if it omitted Euston House altogether it would in effect be treating the property as a railway hereditament in contravention of sub-s. 5 ; and that therefore sub-s. 5 impliedly authorizes the Assessment Committee, in the transitional period, to treat Euston House as rateable under Part I of the list and to treat the Railway Executive as the occupiers.

Before deciding between these rival contentions, I must refer briefly to the other provisions of the Act to which our attention was called. Section 89, sub-s. 6, prohibits any alteration in the list in force at the date of the passing of the Act (March 29, 1948) so far as that list related to any hereditament, shown therein on March 31, 1948, as a railway hereditament, except (1.) as provided in the preceding sub-sections of s. 89, (2.) under Part III of the Act when that comes into force, (3.) under s. 90. Section 90 provides for the removal from the list of railway hereditaments of any hereditament shown as such in the list on March 31, 1948, which is in the occupation of some person other than the British Transport Commission. The section enables the necessary correction to be made in the transitional period prior to the coming into operation of Part III., but there is nowhere in the Act a corresponding provision authorizing an addition to the list of hereditaments during the transitional period. Any correction made under this section has effect as from the beginning of the quinquennial period current at the date of the passing of the Act, or as from the date of the change of occupation, whichever should be the later date. Section 93 deals with the payments to be made in lieu of rates by the British Transport Commission. This contribution during the transitional period, until the list prepared pursuant to Part III comes into force, is fixed for the year 1948–49 at the standard amount (that is, so far as England and Wales are concerned) of 1,810,000*l.*, plus a further sum of 630,000*l.*, and for each of the next two years at the standard amount adjusted as provided by s. 94. The provisions as to adjustment do not, in my opinion, affect the question we have to decide.

I have now, I think, referred to all the relevant sections of the Act and I return to s. 89, sub-s. 5, on which the question before us really depends. Mr. Williams was, I think, right when he said that the language of that sub-section is peculiarly inapt if the intention was to make a hereditament which is a railway hereditament within the definition in s. 86, rateable as if it were not a railway hereditament. Moreover, I am unable to accept Mr. Rowe's argument that unless the inclusion of Euston House in part I of the provisional list as in the occupation of the Railway Executive is upheld, his clients will be infringing s. 89, sub-s. 5. If the Assessment Committee were to omit the premises altogether from the list (and it is unnecessary for me to decide whether they should do so) they would be omitting the name not in order to secure that the premises were treated as a railway hereditament but in order to record the fact that the Crown was no longer in occupation; but even if they leave the name of the occupier blank in part I, or substitute the name of the Railway Executive for that of the Crown in part I, the Railway Executive would, in my opinion, not be liable to pay rates. To hold otherwise would be in direct conflict with s. 85, sub-s. 1, in the absence of a provision rendering the premises liable to be rated. Section 89, sub-s. 5, is restrictive and not enabling, and I am unable to spell an enabling provision out of that sub-section or any other provision in the Act. The effect of sub-ss. 3 and 4 was to exclude from part III of the list all railway hereditaments appearing therein on March 31, 1948, except so far as any such hereditaments were being used otherwise than for rateable purposes within s. 86, sub-s. 2. Sub-section 5, in my opinion, merely prohibits the addition to part III of any railway hereditament. If the Authority were to remove Euston House from part I. of the list, they would be making that alteration, not for the purpose of securing that Euston House is treated as a railway hereditament, but to show that it is no longer in Crown occupation. They would therefore not, in my opinion, be infringing sub-s. 5.

Mr. Rowe pointed out that if this view were right, the effect would be that until part III of the Act of 1948 comes into operation the Rating Authority would get no rates on those premises and no contribution in lieu of rates. That is true; but this does not seem to me unreasonable, as if a hereditament ceases to be a railway hereditament owing to change of occupation, the Rating Authority will be able to get rates on that hereditament through the operation of s. 90 without apparently suffering any reduction in the annual contribution to which it is entitled under s. 85, sub-s. 1, and s. 93. This is rough and ready justice, and I see nothing to justify us in placing a strained construction on s. 89, sub-s. 5, in order to give effect to Mr. Rowe's contention. For these reasons I would dismiss the appeal.

SINGLETON L.J. referred to the facts and continued: There arises in this appeal a question of some difficulty under the Local Government Act, 1948, and, in particular, under ss. 85–90 of that Act. The sections are in Part V of the Act, which part, so far as is material, came into operation on April 1, 1948, that is, before the provisional list was made. The Act of 1948 brings about a complete change in rating practice generally, and, by Part V, a departure from the system of rating of transport and electricity authorities which has prevailed for some little time. Railways were acquired by the State as from January 1, 1948, and one of the main purposes of Part V of the Act was to free them from rateability, the State making payments for the benefit of local authorities in lieu of rates, and the sums so paid are to be distributed by the Minister of Health among rating authorities in England and Wales in proportion to the rateable values for their respective areas for the year. The freedom from rating is given by these words in s. 85, sub-s. 1: "Save as is otherwise "provided in this Part of this Act, no premises which are or "form part of (*a*) a railway . . . . hereditament (as defined "for the purposes of this Part of this Act) . . . . shall be "liable to be rated or included in any valuation list or in "any rate . . . ." Section 86 contains the definition of "railway hereditament," and it is admitted that the words of the definition cover the hereditament in question. Accordingly, the claim of the Railway Executive is that these premises, being a railway hereditament, are not liable to be rated and ought not to be included in the valuation list or in any rate.

The case for the Assessment Committee is based on s. 89 of the Act, a section which gives rise to some difficulties of construction. [His Lordship then referred to sub-ss. 1, 2 and 4 of s. 89, and having read sub-s. 3, which provides: "Until other provision is made under Part III the heredita-"ments which on March 31, 1948, are shown in the valuation "lists as railway hereditaments shall . . . . be deemed to "be railway hereditaments for the purposes of this Part of "this Act" and continued :] The Lord Chief Justice appears to have formed the view that the result of sub-s. 3 is to set up another class of hereditaments which are to be deemed to be railway hereditaments but which are not occupied by or for the purposes of the British Transport Commission. It is a little difficult to see why they should be deemed to be railway hereditaments if they were not occupied for railway purposes and occupied by the Transport Commission. Moreover, s. 90 is expressly designed to secure that a hereditament appearing in the list as a railway hereditament and which is on March 31, 1948, in the occupation of some person other than the Transport Commission shall cease so to appear. My impression is that the object of, or behind, s. 89 was to lighten the task of those who had to work the scheme during the transitional period. It was not necessary, the framers of the section considered, for them to go into the precise user of every hereditament claimed to be a railway hereditament. If a hereditament was on the old valuation roll, and consequently on the valuation list (as corrected) as a railway hereditament, it was to be deemed to be one and it was to be dealt with under sub-s. 4. It may be that the object was to make the entries in the valuation lists exclusive during the transitional period, as Mr. Rowe submitted. There is, however, nothing in the Act which so provides, nothing which says that only those hereditaments which are to be deemed to be railway hereditaments shall be treated as such for the purposes of s. 85.

The strongest argument put forward on behalf of the Assessment Committee is based on sub-s. 5 of s. 89. It is said, and said with force, that this hereditament was not on the old valuation roll and consequently not on the existing valuation list as a railway hereditament; that to take it off the valuation list altogether would be to offend against sub-s. 5 (*b*) in that it would be done for the purpose of securing that any other hereditament is treated as a railway hereditament. It was argued that you could not have a kind of floating hereditament and that this one must appear somewhere, and that as there was no other way provided it was the duty of the rating authority and of the Assessment Committee to include it in the manner in which it appears in the provisional and supplemental lists, once it was seen that Government occupation had ceased. It may well be said that sub-s. 5 (*b*) of s. 89 conflicts with s. 85, sub-s. 1 (*a*), for if a hereditament is a railway hereditament under the latter it is not liable to be rated and it ought not to be included in any valuation list, yet, if perchance it is on, and if it does not fall within s. 89, sub-s. 5 (*a*), the provision in s. 89, sub-s. 5 (*b*), operates to prevent its being taken off for the purpose of securing that it is treated as a railway hereditament.

It seems to me that the answer to the problem can be put in one or two ways, possibly in both: (1.) The desire of the Railway Executive is to avoid paying rates in respect of their occupation of this railway hereditament. They are entitled to say: "We do not mind what you do with your valuation "list, but Parliament has declared by ss. 85 and 86 that this "hereditament is not liable to be rated. We wish to "establish that and to show that the demands made upon us "are unwarranted." (2.) It is not a case of seeking to get something done or some alteration made under s. 89, sub-s. 5 (*b*), for the purpose of securing that "any other hereditament "is treated as a railway hereditament." If an alteration is made in the valuation list, it will be made to bring it in accord with the facts and not to secure any particular treatment: by reason of s. 85 it is freed from rates. In other words, this is not a hereditament which is to be deemed to be a railway hereditament under s. 89, sub-s. 3; everyone agrees that it is a railway hereditament as defined by s. 86, and there is no need for reference to hereditaments which are

C. A.

1949

THE KING
v.
ST. PANCRAS BOROUGH ASSESSMENT COMMITTEE.
Ex parte
THE RAILWAY EXECUTIVE.

Singleton L.J.

to be deemed to be railway hereditaments. It is necessary, of course, to bear in mind the words at the commencement of s. 85: "Save as is otherwise provided in this Part of this "Act." I do not think that this can be read as meaning that only hereditaments which are to be deemed to be railway hereditaments under s. 89 can be said to be railway hereditaments. If that had been intended, words to that effect would have appeared somewhere. They do not. On the other hand, Part V commences with s. 85, which gives freedom from rating to a railway hereditament as defined by s. 86; and ss. 87 and 90 show sufficient reason for the commencing words of s. 85.

I would dismiss the appeal. I find nothing in Part V of the Act to take this hereditament out of the status given to it by s. 85 and, that being so, the occupiers are entitled to succeed in their contention that it is not liable to be rated. I confess to a feeling of doubt as to the appropriate form of order, but no question has been raised as to this, and I am satisfied that the figures in both provisional and supplemental valuation lists should be struck out.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitor for Assessment Committee: *R. C. E. Austin, Town Clerk, St. Pancras.*

Solicitor for Railway Executive: *R. P. Humphrys.*

A. W. G.

Affirmed.
[1950] 1 K. B. 887

1949
July 11.

Lord Goddard C.J.

ATTORNEY GENERAL v. LONDON STADIUMS LD.

Revenue—Stamp duty—Exemption—Amalgamation of Companies—Exemption conditional on transferee's retention "of the shares" for two years—Construction—Whether exemption lost by sale of part of shares—Finance Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 55, *sub-s.* 6 (*b*).

Section 55, sub-s. 1, of the Finance Act, 1927, provides for exemption from stamp duty on a transfer of shares in connexion with a scheme for the amalgamation or reconstruction of any companies. By s. 55, sub-s. 6 (*b*), however, the exemption is lost if a company acquiring shares (on the transfer of its undertaking) within two years from a certain date "ceases . . . . to be the "beneficial owner of the shares so issued to it."

1949

ATTORNEY-GENERAL *v.* LONDON STADIUMS, LD.

A company "ceases to be the beneficial owner of the shares" within the meaning of that sub-section if it parts with the ownership of any of them. It is not necessary, therefore, in order to bring about forfeiture of exemption from stamp duty that the company shall have ceased to be the beneficial owner of all the shares in question.

PRELIMINARY point of law set down for trial under R. S. C. Or. 25, r. 2.

The defendant company, London Stadiums Ld., was incorporated on April 29, 1946, with a nominal capital of 100*l.* divided into 1,000 shares of 2*s.* each. The object of the company's formation was that it should acquire and amalgamate the undertakings of three companies owning greyhound racing tracks—Wandsworth Stadium Ld., Park Royal Stadium Ld., and Charlton Stadium (1936) Ld. On June 5, 1946, an agreement was entered into for the bringing about of the amalgamation. The capital of the defendant company was then increased to 750,000*l.*, and of the resulting 7,500,000 new 2*s.* shares 7,480,000 were allotted to the three companies in payment of the acquisition of their undertakings by the defendant company.

On July 31, 1946, after the agreement had been presented to the Inland Revenue Commissioners for adjudication of stamp duty, they granted relief from duty under s. 55 of the Finance Act, 1927, (1) intimating that it was granted subject to sub-s. 6 of that section. On November 5, 1946, the three companies sold to a firm of stockbrokers a total of 2,000,000 of the 1s. shares into which part of the 2s. shares had been sub-divided, and the stockbrokers shortly afterwards sold the shares to the public.

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(1) Finance Act, 1927, s. 55, sub-s. 1: "If in connexion with a "scheme for the . . . . amalgamation of any companies it is shewn "to the satisfaction of the Commissioners of Inland Revenue that "there exist" prescribed conditions ". . . . (B) Stamp duty "under the heading 'Conveyance "'or Transfer on Sale' in sch. I. "to the Stamp Act, 1891, shall "not be chargeable on any "instrument made . . . . in "connexion with the transfer "of undertaking or shares. . . ." Sub-s. 6: "If . . . . (*b*) where "shares in the transferee "company" [the company acquiring the undertaking of an existing company or companies] "have been issued to the existing "company in consideration of "the acquisition, the existing "company within a period of "two years from the date . . . . "of the authority for the increase "of capital of the transferee "company ceases, ... to be "the beneficial owner of the "shares so issued to it . . . . "the exemption [from stamp "duty] shall be deemed not to "have been allowed, and an "amount equal to the duty "remitted . . . . shall be "recoverable from the transferee "company as a debt due "to His Majesty . . . . with "interest . . . ."

The Inland Revenue Commissioners thereupon brought this action against the defendant company by the Attorney-General, claiming payment, under s. 55, sub-s. 6 of the stamp duty which had been excused.

The issue now came for trial, as a preliminary point of law, whether, on the true construction of the sub-section, the defendants were liable to make the payment claimed.

Sir Andrew Clark K.C. and *J. H. Stamp* for the Crown.

Millard Tucker K.C. and *John Clements* for the defendant company.

LORD GODDARD C.J. This case raises a short point of construction on which I have come to a clear conclusion. I came to that conclusion even before I saw the judgment of Lord Greene M.R. in *Lever Brothers Limited* v. *Inland Revenue Commissioners* (1). It is a satisfaction to me to find that, although there is good ground for saying that the conclusion which he expressed was obiter, his opinion was the same as that which I have formed.

The position is this: by s. 55 of the Finance Act, 1927, Parliament gave certain relief to companies which were reconstructing themselves or amalgamating with other companies. It is unnecessary to go through the elaborate provisions of this rather complicated section, for a full exposition of it was given by the Master of the Rolls in the case just cited. Suffice it to say that, where a company has amalgamated with another company or companies, and certain conditions are fulfilled, relief is given by the section from capital and transfer stamp duty. A necessary element in the amalgamation of companies is that the undertaking or the shares of a company are transferred to the company with which it is being amalgamated; and in the ordinary way, but for this section, stamp duty would have to be paid on the transfer of the undertaking or the shares in the same way as, if a man buys shares on the Stock Exchange, ad valorem stamp duty has to be paid on the transfer of the shares to him. The section exempts the deed

(1) [1938] 2 K. B. 518.

conveying the shares from stamp duty provided that certain conditions with regard to the amalgamation are fulfilled.

[His Lordship read s. 55, sub-s. 6, referred to the facts, and continued :] The only question to be determined is the true construction of the words " ceases to be a beneficial owner of " the shares so issued to it." Mr. Tucker has contended for insertion of the word " all," so that the sub-section would read " ceases to be the beneficial owner of all the shares so " issued " ; and he argues that, as the existing companies did not sell all the shares in the defendant (or transferee) company which they had acquired, s. 55, sub-s. 6, does not catch the defendant company, and it still remains exempt from stamp duty and does not have to account for it to the Crown. He argues that, for the Crown to succeed, the court would have, on the other hand, to read the words as " ceases " to be the beneficial owner of the shares so issued to it or any " of them."

My view is that I do not have to add any words to the sub-section at all. I have simply to decide the true construction of the words " ceases to be the beneficial owner " of the shares so issued to it." It seems to me that s. 55 concerns what may be called a genuine amalgamation of companies. It contemplates that if a transferee company is to have this very substantial benefit by way of relief from very heavy stamp duty the existing company to which the shares are transferred must keep those shares. The shares must be kept, and not marketed to the public or elsewhere for a period of at least two years. The exemption granted by s. 55 was meant to facilitate not the creation of a market in shares, but what may be called the genuine amalgamation of businesses which are to remain amalgamated for at least two years. However that may be, and giving the full effect to the rule of construction which Mr. Tucker has stressed—that if there is an ambiguity in a taxing Act, it must be resolved in favour of the taxpayer—and assuming that in what is an exception to an exception that rule would apply, I fail to find any ambiguity here. I think it impossible to say that, where a person parts with some of the shares that have been issued to him, he remains the beneficial owner of the shares so issued ; he does not. Suppose that X shares are issued to a person : when he has sold some of the shares he is not the beneficial owner of X shares ; he is the beneficial owner of X minus Y shares. It seems to me, therefore, that on the clear words of

1949

ATTORNEY-GENERAL v. LONDON STADIUMS, LD.

the statute the Crown is right in its contention, and I accordingly decide the preliminary point in its favour.

Judgment accordingly.

Solicitors for the Crown: *Solicitor of Inland Revenue.*

Solicitors for the defendant company: *Kenneth Brown, Baker, Baker.*

R. C. C.

1949

June 23, 24.

Streatfeild J.

R.B. POLICIES AT LLOYD'S *v.* BUTLER.

Limitation—Theft of motor car—Action against innocent purchaser—Identity of thief not known—When cause of action accrued—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 2, *sub-s.* 1; *s.* 3, *sub-s.* 1; *s.* 26.

A motor car was stolen in 1940. The identity of the thief was not known and the car was not traced until 1947. The plaintiffs (successors in title to the owner of the car) then brought an action against the defendant, an innocent purchaser for value of the car, for its recovery. The defendant relied on the Limitation Act, 1939.

Held, that a cause of action accrued against the thief in 1940, notwithstanding the fact that his identity was unknown, and the plaintiffs' right of action against the defendant was, therefore, barred by s. 3, sub-s. 1, of the Limitation Act, 1939.

ACTION.

On June 27, 1940, a certain Lanchester motor car was feloniously stolen from its owner by a person or persons unknown. The owner recovered from his insurers, the plaintiffs, and transferred the legal ownership of the car to them. The plaintiffs were unable to trace the car until 1947.

On July 16, 1947, the plaintiffs issued a writ against the defendant. They alleged that he was in possession of the stolen car; that, in spite of requests by them he refused to deliver it to them; and they claimed delivery of the car and damages for its detention.

The defendant relied (inter alia) on the Limitation Act,

1949

R. B. Policies at Lloyd's *v.* Butler.

1939 (1), and contended that a cause of action in respect of the conversion or wrongful detention of the stolen car had accrued to its owner, from whom the plaintiffs derived their title, on June 27, 1940, when the car was stolen, more than six years before the issue of the writ.

The plaintiffs contended that, since the identity of the thief or thieves was unknown, there was no person in existence at that time capable of being sued, and that no cause of action had therefore accrued at that date.

An order was made for the trial of the preliminary question of law whether the action was barred by the Limitation Act, 1939.

F. Atkinson for the plaintiffs. The plaintiffs could not have begun the present action earlier. It would be unjust if the Limitation Act, 1939, precluded them from recovering, and it should not be construed in such a way as to have that effect. Lord Atkinson said in *Board of Trade* v. *Cayzer, Irvine & Co.* (1) that the purpose of the Limitation Acts was to deprive only persons who had good causes of action which they could, if so disposed, have enforced, of the power of enforcing them, after they had laid by for the statutory period and omitted to enforce them. Vigilantibus non dormientibus is the maxim behind the Acts. The plaintiffs in the present case had by no means fallen asleep on their rights: they never in fact had the power of enforcing them during the statutory period.

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(1) Limitation Act, 1939, s. 2, sub-s. 1: "The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:— (*a*) actions founded on simple contract or on tort . . . ."

Section 3, sub-s. 1: "Where any cause of action in respect of the conversion or wrongful detention of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion or wrongful detention takes place, no action shall be brought in respect of the further conversion or detention after the expiration of six years from the accrual of the cause of action in respect of the original conversion or detention."

Sub-section 2: "Where any such cause of action has accrued to any person and the period prescribed for bringing that action and for bringing any action in respect of such a further conversion or wrongful detention as aforesaid has expired and he has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished."

Section 26: "Where, in the case of any action for which a period of limitation is prescribed by this Act, either— (*a*) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or (*b*) the right of action is concealed by the fraud of any such person as aforesaid . . . . the period of limitation shall not begin to run until the plaintiff has discovered the fraud . . . . , or could with reasonable diligence have discovered it: Provided that nothing in this section shall enable any action to be brought to recover . . . . any property which—(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed . . . ."

No cause of action had accrued to the plaintiffs within the meaning of s. 2, sub-s. 1, and s. 3, sub-s. 1, of the Limitation Act, 1939, until they discovered who was in possession of the motor car. A cause of action cannot accrue unless there be a person in existence who can be sued; Halsbury, Laws of England, 2nd ed., vol. 20, p. 618; *Douglas* v. *Forrest* (2). There was no person in the present case who could be sued until the plaintiff discovered that the motor car was in the possession of the defendant. The case is analogous to that in which the right of action is concealed by the fraud of the defendant. The cause of action does not then accrue until the fraud is discovered; Lord Coleridge C.J. in *Gibbs* v. *Guild* (3).

Hart Jackson for the defendant. As regards the alleged injustice caused by reliance on the Limitation Act, 1939, the defendant is a perfectly innocent purchaser for value of the motor car, and it would be unjust to him were the plaintiffs' claim enforceable. The purpose of the Limitation Acts was not only to prevent plaintiffs sleeping on their claims, but also to prevent cruelty to defendants; *A'Court* v. *Cross* (4). The Acts always barred an action in conversion begun more than six years after the conversion, although the plaintiff did not know of the conversion within that period, unless there had been fraud; *Granger* v. *George* (5). Even under the old Act, 4 Anne, c. 16, s. 19, time began to run, though the defendant was overseas, and could not therefore be sued, if, unknown to the plaintiff, he returned for a few hours to this country; *Gregory* v. *Hurrill* (6). [He referred also to *Coburn* v. *Colledge* (7).]

Atkinson replied.

(1) [1927] A. C. 610, 628.
(2) (1828) 4 Bing. 686, 704.
(3) (1882) 9 Q. B. D. 59, 65.
(4) (1825) 3 Bing. 329, 332.
(5) (1826) 5 B. & C. 149.
(6) (1826) 5 B. & C. 341.
(7) [1897] 1 Q. B. 702.

STREATFEILD J. I assume for the present purpose that the motor car which was stolen on June 27, 1940, was the same motor car as that which is in the possession of the defendant, having passed to him, an innocent purchaser, through a line of intermediate purchasers.

It is necessary to determine when the plaintiffs' cause of action accrued. If it accrued to the owner of the motor car (their predecessor in title) as soon as it was stolen, so that he then had a cause of action against the thief for conversion, and then, before the plaintiffs recovered possession, there were further conversions by a line of persons of whom the defendant was the last, by s. 3, sub-s. 1, of the Limitation Act, 1939, no action can be brought against any of them after six years from the date of the theft, and the present action must therefore fail.

When does a cause of action accrue? When the thief, whoever he was in the present case, stole the motor car in 1940 he clearly converted it to his own use, and apart from the question of prosecution for the felony, if he had then been known, an action could undoubtedly have been brought against him for conversion of the car. There being thus a cause of action, I have to determine whether it is necessary that there should be an actual known and available defendant to such an action before it can be said that the cause of action has accrued within the meaning of s. 2, sub-s. 1, and s. 3, sub-s. 1, of the Limitation Act.

Various definitions have been made of an accrual of a cause of action, and I start with the proposition in Halsbury, Laws of England, 2nd ed., vol. 20, p. 618, which has been submitted by Mr. Atkinson: "A cause of action cannot "accrue unless there be a person in existence capable "of suing and another person in existence who can be sued." In the present case there was, of course, a person capable of suing, but was there another in existence who could be sued?

Is it to be said that because a person is, possibly only temporarily, untraceable, he is not in existence, or cannot be sued? Whoever the thief was, if he had been traceable, he could have been sued; so I doubt whether it can be said that there was no person in existence, for the purpose of that definition, who could have been sued.

It was, no doubt, a misfortune to the plaintiffs that they could not find a defendant whose name they could insert in a writ; but every other ingredient of the cause of action was present. The motor car had, in fact, been converted. A statement of claim could have been drawn without any difficulty; the only item missing being the name of the defendant. Does the fact that the defendant is absent and unknown prevent the accrual of a cause of action against him?

It is of assistance to examine the position arising under s. 26 of the Act of 1939, although the present case was not, of course, one in which a cause of action was concealed by fraud; the cause of action was only too obvious the moment when the owner missed his motor car; that which was concealed was not the cause of action, but the identity of the person against whom it lay. But looking at s. 26 I think that light is thrown upon the present problem.

It is, I think, clear from that section that, since it was necessary to provide that where the right of action was concealed by fraud the period of limitation should not begin to run until the discovery of the fraud, time in an ordinary case begins to run even though the plaintiff is ignorant of his right of action. The section was inserted to protect a plaintiff who was ignorant of his right of action in the special case of fraudulent concealment, and to overcome the difficulty that time would otherwise have been running against him, unknown to himself. But for the section, time would have run against him from the accrual of his right of action, for it is to be noted that the section, even in the case of fraudulent concealment, does not say that the cause of action shall not accrue until the fraud is discovered, but simply that "time shall not "begin to run" until that event.

It is to be noted that s. 26 is the only provision in the Limitation Act, 1939, in which a special exception of that nature is made. Nowhere is it to be found that where a person, who otherwise has a perfect cause of action, cannot pursue it because the defendant is unknown, time does not run. And it seems to me, therefore, that prima facie as soon as there is a cause of action (as there clearly was in the present case the moment the motor car was stolen) time begins to run notwithstanding the fact that the plaintiff is ignorant of the identity of the defendant.

Another illustration of time running against a plaintiff who was unaware of his right of action arose under the statute 4 Anne, c. 16, s. 19, to which Mr. Jackson drew my attention. By that Act, which has now been repealed by s. 34, sub-s. 4, of the Act of 1939, the position was that, if at the time of the accrual of a cause of action the defendant was overseas, time did not begin to run against him until he returned to this country. The provision applied only to cases in which the defendant was overseas when the action actually accrued; it did not apply to the case, where the right of action having accrued, he then proceeded overseas, and remained there, in which case, time continued to run against the plaintiff all the time, although he could not sue the defendant. If time had not begun to run because the defendant was abroad, and he returned to this country, although only for a few hours or days, and even although his return was unknown to the plaintiff, time began to run. It was so held in *Gregory* v. *Hurrill* (1). In that case the defendant was on a sailing vessel returning from overseas to Scandinavia, and while the ship was awaiting favourable winds off the Port of Deal, he went ashore to visit the Scandinavian Consul. It was held that that visit for a few hours at Deal constituted a return by the defendant to this country, so that time then began to run in his favour against the plaintiff, although the latter was unaware of it.

Can it be said, therefore, that the cause of action being otherwise complete, the ignorance of the owner of the car of the identity of the person against whom he could bring an action was of itself sufficient to prevent the accrual of that cause of action? I think not, and I agree with the argument of Mr. Jackson. If that were so it would lead to appalling results. As Mr. Jackson suggested to me, if his watch were stolen, and he discovered it years later, in the pocket of a wholly innocent person who had bought it many years before, it would follow that, if the plaintiffs are right, he could bring an action for the recovery of his watch merely because he had not known who was the original thief. I cannot think that that is the policy of the Act, or that to construe its words in favour of the plaintiffs' argument would harmonize with the intention of the legislature.

I agree with Mr. Atkinson that it is a policy of the Limitation Acts that those who go to sleep upon their claims should not be assisted by the courts in recovering their property, but another, and, I think, equal policy behind these Acts, is that there shall be an end of litigation, and that protection shall be afforded against stale demands. In *A'Court v. Cross* (2) Best C. J. referred to the policy of the Limitation

(1) 5 B. & C. 341.

(2) 3 Bing. 329, 332.

1949

R. B. POLICIES AT LLOYD'S v. BUTLER.

Streatfeild J.

Act, 1623, as follows: "It has been supposed that "the legislature only meant to protect persons who had "paid their debts, but from length of time had lost "or destroyed the proof of payment. From the title "of the act to the last section, every word of it shews "that it was not passed on this narrow ground. It is, as "I have heard it often called by great judges, an act of peace. "Long dormant claims have often more of cruelty than of "justice in them." I am not suggesting that the plaintiffs in the present case are guilty of heartless or cruel conduct, but a claim, made seven or eight years after the motor car was stolen, against a perfectly innocent holder, who has given good consideration for it without knowledge that it was a stolen car does not seem just. I think that an equal policy of the Limitation Act, 1939, is to prevent injustice of this kind.

This is a case in which one of two unfortunate innocent parties must suffer. And, in my view, on the proper construction of the word "accrued" the cause of action in the present case did accrue in 1940 when the car was stolen, and it was the misfortune of the plaintiffs that they were unable to pursue that cause of action through their ignorance of the identity of a possible defendant. The preliminary point must therefore be decided in favour of the defendant.

Judgment for defendant

Solicitors for plaintiffs: *Gibson and Weldon for John Whittle, Robinson and Bailey, Manchester.*

Solicitors for defendant: *Peacock and Goddard, for Barlow, Parkin & Co., Stockport.*

R. P. C.

C. C. A.

REX v. KRITZ.

1949
July 13.

Lord Goddard C.J., Oliver and Stable JJ.

Criminal law—Obtaining money by false pretences—Gist of offence—Untrue statements causing transfer of money—Intention and expected ability to repay money—Relevance.

If a man makes statements which he knows to be untrue for the purpose of inducing another to pay him money which he knows that that other would not pay if he did not believe that those statements were true, and if he intends to use the money for purposes different from those to which, to his knowledge, the other has understood from the statements that it is to be applied, then the intent to defraud, necessary to the crime of obtaining money by false pretences, is present; and it is immaterial that the person obtaining the money may both have intended to repay the money and have honestly believed in his ability to do so.

A man obtained money from a bank by paying into his account worthless cheques drawn on persons known by him to be men of straw. He induced the bank manager to pay him cash against the cheques before their presentation by telling him that they were good and represented the proceeds of deals in whisky. He was indicted, in respect of certain of the cheques, for obtaining money by false pretences. In fact the money obtained from the bank on the cheques, the subject-matter of the indictment, was used to enable other worthless cheques, on which the bank had advanced him money, to be met, so that the bank's position was actually improved after the moneys in question had been obtained.

Held, that the transactions in question were all part of a series of transactions designed to defraud the bank, and that the intent to defraud was accordingly established notwithstanding that the moneys mentioned in the indictment were in effect repaid to the bank.

Direction to the jury by Channell J., in *Rex* v. *Carpenter* (1911) 22 Cox C. C. 618, 624, approved.

Rex v. *Pickup* (1931) 22 Cr. App. R. 186, discussed and distinguished.

The accuracy of a summing up cannot be made to depend on whether a particular form of words is used. It is only the effect of the summing up which matters. If the jury are made to understand that they must not return a verdict against the prisoner unless they are sure of his guilt and that the burden of proof is all the time on the prosecution and not on the defence, then the form of words used by the judge is immaterial.

Where, therefore, in a summing up otherwise clear and fair the judge directed the jury that they must be "reasonably "satisfied" of the prisoner's guilt, and did not tell them, as it was contended that he should, that they must be satisfied of that guilt beyond reasonable doubt:—

Held, that the jury were adequately directed.

APPEAL from conviction.

The appellant, Abraham Barnett Kritz, was convicted at the Central Criminal Court of obtaining four sums of money totalling 72,000*l*. by false pretences from the Midland Bank Ld., on December 11 and 12, 1946. In order to obtain finance from the bank, the appellant habitually paid into his account worthless cheques which he knew to be drawn on the accounts of persons of straw. By falsely pretending to the manager

C. C. A.

1949

REX
v.
KRITZ.

of the branch in question of the bank that the cheques were good and represented the proceeds of deals in whisky, he obtained cash against them for their full face value before they were cleared. Some of the cash obtained he paid into the accounts of the drawers of the worthless cheques in order to enable the cheques to be met and to enable the scheme to continue. Between June and December, 1946, large sums of money had passed through his account in this way.

Immediately before December 11, 1946, cheques totalling 93,800*l.* were in the course of collection by the bank, which had paid the appellant 93,800*l.* on them. On December 11 and 12, 1946, the appellant paid further worthless cheques into the bank and received in exchange 93,447*l.*, which amount included the four sums the subject-matter of the indictment. On December 11 and 12, 1946, the appellant paid the whole of this 93,447*l.*, together with other moneys of his own, into the accounts of the drawers of the cheques totalling 93,800*l.* in order to enable those cheques to be met, as in fact they were, and he also paid cash into his account with the bank. In the result his position with the bank was slightly better after he had obtained the moneys forming the subject-matter of the charges and used them in the way described than it had been before he obtained them.

In his evidence the appellant denied making representations about whisky, and alleged that the bank manager concerned had known that the cheques were worthless. He further stated that he did not intend to defraud the bank; that he always intended to use, and did in fact use, the 72,000*l.* for the purpose of enabling some of the outstanding cheques to be met; and, accordingly, that the bank was in no way injured by advancing the money in respect of which he was charged. It was not disputed by the prosecution that the bank was not injured by the act of the appellant in obtaining the particular 72,000*l.* in respect of which he was charged.

The Common Serjeant in his summing up directed the jury that in considering intent to defraud they must disregard the use which the appellant made and intended to make of the 72,000*l.*, and also the fact that the bank was not injured by the appellant's acts of December 11 and 12.

The appellant was convicted and sentenced to four years' penal servitude. He now appealed.

Leon for the appellant. The chief complaint to be made of the summing up is that it withdrew from the jury the essential question whether the appellant had the intent to defraud. Though the cheques, the subject-matter of the indictment, were worthless and in due course dishonoured, the whole of the money obtained on them was in fact so used as to ensure that the previous cheques on which the appellant had obtained other moneys from the bank should be duly met, as in fact they were. In respect of these cheques, therefore, there was, it is submitted, no intent to defraud, that is, no intent to injure the bank. The direction given by Channell J. to the jury in *Rex* v. *Carpenter* (1), on which the direction given by the Common Serjeant here is founded, is inconsistent and irreconcilable with the decisions in *Rex* v. *Hunt* (2) and *Rex* v. *Pickup* (3). It is true that Avory J. in *Rex* v. *Parker and Bulteel* (4) repeated Channell J.'s direction in *Rex* v. *Carpenter* (1), but he was a party to the decision in *Rex* v. *Pickup* (3). [*Rex* v. *Secombe* (5) referred to.]

If a person intends to repay money and has a reasonable expectation of being able to do so, it is open to the jury to find that there was no intent to defraud. That opportunity, it is submitted, was denied to the jury here.

The summing up was also defective in that the Common Serjeant told the jury merely that they must be " reasonably " satisfied " of the appellant's guilt, instead of telling them that they must be satisfied beyond reasonable doubt. The latter form of words alone, of the two forms, indicates to the jury the weight of the burden of proof resting on the prosecution.

Christmas Humphreys and J. S. Bass for the prosecution [called on only on the question of intent to defraud]. It is submitted that there is really no need to cite authorities on this point. The Common Serjeant's direction, following as it does that given by Channell J., in *Rex* v. *Carpenter* (1), was correct. *Rex* v. *Pickup* (3) depends entirely on its own peculiar facts [They were stopped.]

Leon replied.

Lord Goddard C.J. [giving the judgment of the court,

(1) (1911) 22 Cox C. C. 618, 624.
(2) (1918) 13 Cr. App. R. 155.
(3) (1931) 22 Cr. App. R. 186.
(4) (1916) 25 Cox C. C. 145, 160.
(5) (1917) 12 Cr. App. R. 275.

C. C. A.
1949
REX
v.
KRITZ.

stated the facts, and continued :] The whole foundation of this audacious and scandalous fraud was that the appellant was representing that he was a bona fide dealer in whisky. In fact, he was simply a common fraud getting money out of the bank. The only value of this case is to have occasioned a discussion of the meaning of the words "intent to defraud" with reference to the cases on false pretences and fraudulent conversion. It was argued for the appellant that the question of the intent to defraud was withdrawn from the jury because of this passage from the summing up: "In my view, and "this is the ruling that I must give you in law because the "law is my province, if a false statement, false to the knowledge of the person making it, is made, and by this means "money or credit is obtained, and the person who gives that "money or credit does so in reliance on the false statements "that have been made—well, that is sufficient and you need "not go any further. The fact that the man may, and "undoubtedly would if he got the chance, repay the money "is, to my mind, quite immaterial, even if, in fact, it can be "said that he did repay the money, . . . but it is immaterial "what he intended to do with the money if he obtained it "by means of pretences that are false, with intent to defraud. "And to defraud, as I say, means by deceit to get other "people to take a certain course of action that is harmful "to them." The direction which the Common Serjeant gave on this matter is said to be wrong because it was still open to the appellant to satisfy the jury, if he could, that there was no intent to defraud. The appellant endeavoured so to satisfy the jury mainly by saying that the bank manager was in the business from the start, knew all about it, and knew that the appellant had no whisky. The bank manager denied that. There is no ground for saying that the jury took any other view; for the Common Serjeant told them that if they thought that the bank manager was in the business, to use a neutral expression, then there was no case against the appellant at all,—no intent to defraud.

This court desires to state in the clearest possible terms that it approves of the direction given by Channell J., in *Rex* v. *Carpenter* (1). That is the locus classicus on this point. The case arose out of the failure of the Charing Cross Bank. The judge obtained counsel's assent to the direction which he was going to give, and it is not unimportant to observe

(1) 22 Cox C. C. 618, 624.

that the counsel concerned were Sir John Simon, the Solicitor-General, for the Crown and Sir Henry Dickens, afterwards Common Serjeant of the City of London, for the defendants. The judge said (1): " If the defendant made statements of fact " which he knew to be untrue, and made them for the purpose " of inducing persons to deposit with him money which he " knew they would not deposit but for their belief in the truth " of his statements, and if he was intending to use the money " so obtained for purposes different from those for which he " knew the depositors understood from his statements that " he intended to use it, then, gentlemen, we have the intent " to defraud, although he may have intended to repay the " money if he could, and although he may have honestly " believed, and may even have had good reason to believe, " that he would be able to repay it. You see it is the fraud " in the mode of getting the money, because you may by " fraud get hold of money, even if you mean to repay it, and " thoroughly believe that you can repay it—you are still " defrauding the depositor." Mark the next passage: " You " are not defrauding him of the money if you eventually do " repay it, but you are defrauding the man because you are " giving him something altogether different from what he " thinks he is getting, and you are getting his money by your " false statement. In such a case as that the false statement " would not be honestly made, and this question as to the " intent to defraud substantially comes to this: whether or " not the statements were honestly made."

That is the charge, the statement of the law given by one of the most eminent judges before whom I ever had the good fortune to practise. It has been universally regarded by judges and counsel as the locus classicus on the point. Those words were repeated in his charge to the jury by Avory J. in *Rex* v. *Parker and Bulteel* (2), when he told them that that was the law on the subject.

Counsel for the appellant has, however, cited later cases which, he says, are in conflict with that decision. Whatever rule of law be laid down, whatever guide be given to a jury, there must always be, human affairs being what they are, some exceptional case in which the general rule laid down may not be wholly applicable. It is impossible, very often, to direct a jury or to lay down in a judgment by means of particular words, or by using particular expressions, a rule that is to be universally applied without regard to the particular facts of a particular case. That is illustrated by the case on which counsel for the appellant most relied, *Rex* v. *Pickup* (1). There the appellant had a car on a hire-purchase agreement, under which he was some 50*l.* in arrear with his instalments. Having still some 70*l.* to pay in instalments not yet due, he sold the car to the prosecutor for 150*l.* and another car. After receiving the 150*l.* he proceeded to pay off the arrears due to the hire-purchase company, and subsequently paid other sums in discharge of his debt to them. Before the police court hearing the prosecutor had agreed to accept certain property of the appellant in discharge of the liabilities to the hire-purchase company which had been transferred to him (the prosecutor) by the hire-purchase company. The Recorder told the jury that, as the appellant had said that the car was his, there was an end of the case and they need not consider anything else.

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(1) 22 Cox. C. C. 618, 624.

(2) 25 Cox C. C. 145.

That case simply shows that there may often be a case which on its particular facts ought not to be brought within some general principle laid down by judges from time to time. It was perfectly possible in *Rex* v. *Pickup* (1) that the appellant might have been,—probably he was—an honest man. Many people may be excused for thinking,—I do not want to encourage it, because it is not accurate—that when they have a car on hire-purchase on which they have paid a considerable sum it is their property and they are at liberty to sell it. The question to be left to the jury is whether the man was honest. That is really only an application of what Channell J. said in *Rex* v. *Carpenter* (2), namely, that in such a case as that before him the false statement would not be honestly made, and that "this question as to the intent to defraud "substantially comes to this: whether or not the statements "were honestly made."

The reason why the court quashed the conviction in *Rex* v. *Pickup* (1) was that the Recorder had withdrawn from the jury any chance of their saying that the appellant's statements were honestly made in the circumstances of the case. In the present case, however, how could that possibly have been left to the jury? The appellant's defence was that the bank manager was in this all the time. True, the appellant said that he had no intent to defraud, and bolstered that statement up by saying that he was going to pay the money back to the

(1) 22 Cr. App. R. 186. (2) 22 Cox C. C. 618, 624.

bank. That was not the point: the point was that here there was not an isolated transaction as was the case in *Rex* v. *Pickup* (1), but a series of transactions all of which had one common object, to defraud the bank.

Therefore there is nothing in the point that the judge did not properly leave to the jury the question of intent to defraud, and in our opinion he did not give any wrong direction. I repeat that this court has not the least intention of departing from the classic judgment on this question given in *Rex* v. *Carpenter* (2), which we do not hesitate to say is a correct statement of the law. We say that in order that there may be no further doubt in anybody's mind about the law with regard to intent to defraud or the direction which should be given to the jury.

That is the main point in the case. The only other point which has been seriously argued is that because the Common Serjeant told the jury that they must be reasonably satisfied, and did not use the words "satisfied beyond reasonable "doubt," he was not sufficiently stating the onus of proof. It would be a great misfortune, in criminal cases especially, if the accuracy of a summing-up were made to depend upon whether or not the judge or the chairman had used a particular formula of words. It is not the particular formula that matters: it is the effect of the summing-up. If the jury are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence, then whether the judge uses one form of language or another is neither here nor there.

In our opinion, there was a perfectly fair and proper summing-up by the Common Serjeant here. We do not think that any jury could have been left in any doubt what was their duty. Juries are not such fools as they are very often thought to be. They know, when they have been in the jury box a short time, that it is the duty of the prosecution to prove the case and that they have to be fully and thoroughly satisfied; and they very seldom want guidance on that point. It is right that they should have it—that they should be reminded that the onus is on the prosecution all the way through the case. It is right that they should be reminded in a criminal case that they must be fully satisfied of the guilt of the accused person and should not find a verdict against

(1) 22 Cr. App. R. 186.

(2) 22 Cox. C. C. 618, 624.

C. C. A.

1949

REX
v.
KRITZ.

him unless they feel sure. That is the direction which I myself constantly give to juries. When once a judge begins to use the words "reasonable doubt" and to try to explain what is a reasonable doubt and what is not, he is much more likely to confuse the jury than if he tells them in plain language: "It is the duty of the prosecution to satisfy you of the prisoner's "guilt." The Common Serjeant did not use that formula of words, and I am not saying that it is to be preferred to all others; but what I do say—and I am sure that I can say it with the full assent of my brethren—is that it is not the actual formula used, but the effect of the summing-up which matters; and that, if the effect of the summing-up is to convey to the jury what is their duty, that is enough.

Of the other complaints of the summing-up there is nothing that we need say. We do not find anything substantial omitted which could really have affected the minds of the jury. The simple question was whether they believed the story of the bank manager or the appellant's defence, which was that the bank manager was a party to this series of operations.

The appeal is dismissed.

Appeal dismissed.

Solicitor for the appellant: *Registrar, Court of Criminal Appeal.*

Solicitor for the prosecution: *Director of Public Prosecutions.*

R. C. C.

C. A.

LEDERER v. PARKER.

1949
July 13, 15, 25.

Bucknill and Asquith L.JJ. and Hodson J.

Landlord and tenant—Rent Restriction—Construction—New control dwelling-house—Fully furnished flat let at inclusive rent, covering some attendance—Action under s. 9, *sub-s.* 1, *of the Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *as amended, by tenant to recover profit in rent in excess of* (1939) *normal profit—"Any dwelling-house to which this Act applies".*

By s. 9 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as modified by sch. I to the Rent and Mortgage Interest Restrictions Act, 1939, in its application to new control houses: "(1.) Where any person lets, or has "since the beginning of the date of the passing of the Rent and

"Mortgage Interest Restrictions Act, 1939, let any dwelling-"house to which this Act applies, or any part thereof, "at a rent which includes payment in respect of the use of "furniture and it is proved to the satisfaction of the county "court . . . . that the rent charged is yielding or will yield "to the landlord a profit in excess of the normal profit, as herein-"after defined," the court may order that the rent in excess of a sum which would yield such (1939) normal profit shall be irrecoverable and that payments of rent in excess of that amount paid, since 1939, may be repaid to the tenant.

On an application under s. 9, sub-s. 1, to recover such payments paid to landlords in excess of the amount of (1939) normal profit by the tenants of a flat, which was a new control dwelling-house, where the rent charged included the use of furniture, some attendance and some other services, and where the amount of rent attributable to the use of the furniture formed a substantial part of the whole rent, it was contended for the landlords that s. 9, sub-s. 1, was not applicable, since the flat was not a "dwelling-"house to which this Act applies" within the meaning of that sub-section, in that by s. 3, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1939: "The principal Acts shall not, "by virtue of this section" (see sub-s. 1) "apply . . . . (*b*) save "as expressly provided in the said Acts, as amended by virtue "of this section, to any dwelling-house bona fide let at a rent "which includes payments in respect of board, attendance or "use of furniture."

Held, that the words in s. 9, sub-s. 1, of the Act of 1920, "dwelling-house to which this Act applies" mean merely in the case of a new control house in the metropolitan police district, a dwelling-house whose rateable value on the appointed day did not exceed 100*l*. This fully furnished flat was "a dwelling-"house to which this Act applies" under s. 9, sub-s. 1, of the Act of 1920, since the preliminary words of s. 3, sub-s. 2 (*b*), of the Act of 1939 were: "Save as expressly provided in the said Acts." The case was one of an exception to an exception, to the extent of the operation of ss. 9 and 10 of the Act of 1920, to which sections alone these preliminary words could refer.

Roppel v. *Bennett* [1949] 1 K. B. 115, followed.

Held, also that the flat was subject to the terms of s. 9, sub-s. 1, although the rent charged included not only the use of furniture, but some attendance, removal of rubbish, the use of a telephone and a certain amount of laundering. The county court judge in comparing the profit with the (1939) normal profit was not required to ascertain and eliminate, from both sides of the account, the amounts referable to attendance and amenities other than the use of furniture.

APPEAL from Marylebone county court.

From January 22, 1947, to March 5, 1948, the plaintiffs occupied a fully furnished flat in the Metropolitan police district, let to them by the defendants at a rent of 3*l.* 13*s.* 6*d.* a week. Certain attendance was also provided, removal of rubbish, use of telephone, etc., and a certain amount of laundering, the charge for which was included in the rent. Since the flat was fully furnished the amount of rent attributable to the furniture must have formed a substantial part of the whole rent. The dwelling-house, if a dwelling-house to which the Act applied, was a new control house with a rateable value in the Metropolitan police district of less than 100*l.* In March, 1948, the tenants were given notice to quit and they thereupon applied to a rent tribunal and secured a reduction of rent for the future. The tenants then sued the landlords in the county court for rent overpaid from January 22, 1947, to March 5, 1948, at the rate of 1*l.* 0*s.* 3*d.* a week, i.e., 58*l.* 14*s.* 6*d.* under s. 9, sub-s. 1 of the Rent and Mortgage Interest (Restrictions) Act, 1920, as amended (1). His Honour

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(1) By s. 9, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as modified by sch. I to the Rent and Mortgage Interest Restrictions Act, 1939, in its application to new control houses: "Where any person lets or has, "since the beginning of the date "of the passing of the Rent and "Mortgage Interest Restrictions "Act, 1939, let any dwelling-"house to which this Act applies, "or any part thereof, at a rent "which includes payment in "respect of the use of furniture "and it is proved to the satis-"faction of the county court, "on the application of the tenant, "that the rent charged is yielding "or will yield to the landlord a "profit in excess of the normal "profit as hereinafter defined, "the court may order that the "rent, so far as it exceeds such "sum as would yield such normal "profit shall be irrecoverable "and that the amount of any "payment of rent in excess of "such sum which may have been "made in respect of any period, "after the commencement of the "Rent and Mortgage Interest "Restrictions Act, 1939, shall "be repaid to the tenant."

Sub-section 2: "For the pur-"pose of this section 'normal "'profit' means the profit which "might reasonably have been "expected from a similar letting "in the year ending on the "1st September, 1939."

Rent and Mortgage Interest Restrictions Act, 1939, s. 3, sub-s. 1: "Without prejudice "to the operation of the two "preceding sections in relation "to any dwelling-house to which "the principal Acts applied imme-"diately before the commence-"ment of this Act, the principal "Acts, as amended by the last "preceding section, shall, subject "to the provisions of this section, "apply to every other dwelling-"house of which the rateable "value on the appropriate day "did not exceed—(*a*) in the "Metropolitan Police District or "the City of London 100*l.* . . . . "and in relation to any such "dwelling-house as aforesaid, not "being a dwelling-house to which "the principal Acts applied

C. A.
1949
LEDERER
v.
PARKER.

Judge Bensley Wells gave judgment for the tenants for 14*l*. 10*s*. 0*d*.

The landlords appealed.

Norman King for the landlords. The county court judge held that the provisions of s. 9, sub-s. 1, of the Act of 1920 were applicable to this fully furnished flat. It is submitted that he was wrong and that is the sole question at issue on this appeal. By the express terms of the sub-section, it is limited to the case of where a person lets "any dwelling-house to "which this Act applies." This flat was a new control dwelling-house, and by s. 3, sub-s. 2, of the Act of 1939: "The principal Acts shall not by virtue of this section apply " . . . . (*b*) save as is expressly provided in the said Acts, "as amended by virtue of this section, to any dwelling-house "bona fide let at a rent which includes payments in respect "of board, attendance or use of furniture, ..." This flat was bona fide let at a rent including payment in respect of the use of furniture. And the amount of rent attributable to the use of the furniture, regard being had to the value of the same to the tenants, formed a substantial part of the whole rent (see s. 10, sub-s. 1 of the Act of 1923). The principal Acts, therefore, did not apply to this new control dwelling house.

"immediately before the commencement of this Act, the "provisions of the Rent and "Mortgage Interest Restrictions "Acts, 1920 to 1933, set out in "the first column of the first "schedule to this Act shall have "effect, as if there were made "in those provisions the modifi- "cations prescribed by that "schedule."

Sub-section 2: "The principal "Acts shall not, by virtue of this "section, apply . . . . (*b*) save as is "expressly provided in the said "Acts, as amended by virtue of "this section, to any dwelling- "house bona fide let at a rent "which includes payments in "respect of board, attendance "or use of furniture . . . ."

Rent and Mortgage Interest Restrictions Act, 1923, s. 10, sub-s. 1, as amended by the schedule to the Act of 1939, in applying the sub-section to new control houses: "For the pur- "poses of para. (*b*) of sub-s. 2 "of s. 3 of the Rent and Mortgage "Interest Restrictions Act, 1939 "(which relates to the exclusion "of dwelling-houses from the "principal Act in certain circum- "stances), a dwelling-house shall "not be deemed to be bona fide "let at a rent which includes "payments in respect of attend- "ance or the use of furniture, "unless the amount of rent which "is fairly attributable to the "attendance or the use of the "furniture, regard being had "to the value of the same to the "tenant, forms a substantial "portion of the whole rent."

[ASQUITH L.J. To what cases, then, does s. 9 of the Act of 1920 apply ?]

To those cases where neither that part of the rent charged for attendance nor that part charged for the use of furniture is a substantial amount of the whole rent charged.

[ASQUITH L.J. It would seem that, if you are right, s. 9 of the Act of 1920 had no application, before the Act of 1923 was passed.]

Secondly, if the first contention is wrong, and s. 9 of the Act of 1920 does apply to the case where a substantial amount of the rent charged is for the use of furniture, it does not apply in the case where the rent charged includes also attendance and other extras as for instance board, since s. 9, sub-s. 1 by its terms does not so state.

F. A. Hopkinson for the tenants. The preliminary words in the proviso to s. 12, sub-s. 2 of the Act of 1920, were " save " as otherwise expressly provided " ; and the preliminary words in its successor (s. 3, sub-s. 2 of the Act of 1939) with regard to new control houses are : " Save as is expressly provided in the " said Acts." These words in each case clearly refer to ss. 9 and 10 of the Act of 1929 and so form an exception to an exception. On the contention for the landlords, s. 9 of the Act of 1920 would have no operation between 1920 and 1923. After 1923, it could only operate in those few cases where a few sticks of furniture are charged for in the rent. The case is concluded by the decision of the Court of Appeal in *Roppel* v. *Bennett* (1).

Norman King replied.

Cur. adv. vult.

July 25. BUCKNILL L.J. I will ask ASQUITH L.J. to read his judgment first.

ASQUITH L.J. The landlords' contention is that s. 9, sub-s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as modified by sch. I to the Rent and Mortgage Interest Restrictions Act, 1939, in its application to new control houses, does not apply to this flat, which is a new control dwelling-house. [His lordship read s. 9, sub-s. 1, so modified.] In support of this contention, they rely on s. 3, sub-s. 2 of the Rent and Mortgage Interest Restrictions Act, 1939. Section 3, sub-s. 1 of that Act, provides that the principal Acts shall apply to dwelling-houses of which the rateable value on the appropriate day did not exceed in the Metropolitan police district 100*l*., and in relation to any such dwelling-house not being a dwelling-house to which the principal Acts applied before the commencement of this Act, the provisions of the Acts from 1920 to 1933 set out in the first column of sch. I to the Act are to have effect as if there were made in those provisions the modifications prescribed by that schedule. Then by sub-s. 2: "The principal Acts shall not by virtue of this section apply ". . . . (*b*) save as is expressly provided in the said Acts, as "amended by virtue of this section, to any dwelling-house "bona fide let at a rent which includes payments in respect of "board, attendance or use of, furniture." This provision is now modified by s. 10, sub-s. 1 of the Act of 1923, as amended by sch. I to the Act of 1939 in applying the section to new control houses so that "a dwelling-house shall not be "deemed to be bona fide let at a rent which includes payments "in respect of attendance or the use of furniture unless the "amount of rent which is fairly attributable to the attendance "or the use of the furniture, regard being had to the value of "the same to the tenant, forms a substantial portion of the "whole rent."

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(1) [1949] 1 K. B. 115.

The landlords' contention is that this flat is a dwelling-house, which is bona fide let at a rent, a substantial part of which is fairly attributable to the use of furniture and is, in consequence of the combined effect of the statutory provisions which I have just cited, not a "dwelling-house to which this Act applies," the first words of s. 9, sub-s. 1 being: "Where any person "lets, or has since the beginning of the date of the passing "of the Rent and Mortgage Interest Restrictions Act, 1939, "let any dwelling-house to which this Act applies . . . ." This is the first point taken on behalf of the landlords. The county court judge rejected this contention and, for myself, I think that his decision was right.

The phrase "a dwelling-house to which this Act applies" recurs constantly in the Acts. In construing it in particular contexts regard must be had to the two distinct governing purposes of this body of legislation. Those two purposes, notoriously, are: (1.) to prevent rises in rents beyond moderate and prescribed limits, and (2.) to protect tenants from eviction by limiting or suspending the landlord's rights to possession. A dwelling-house is a "dwelling-house to which this Act "applies" for the first purpose, namely, limitation of rent, if its rateable value is below certain figures specified in the Act—in London, 100*l*. But this will not, without more, make it a "dwelling-house to which this Act applies" for the second purpose, namely, protection from eviction. To secure this last type of protection a further condition must be satisfied, namely, the contractual tenancy must have been terminated by notice to quit, effluxion of time or the like, and replaced by a so-called statutory tenancy. Now s. 9 of the Act of 1920, as amended, is directed purely to limitation of rent, and in such a setting the natural meaning of "dwelling-house to which "this Act applies" is a dwelling-house which, if in London, has a rateable value not exceeding 100*l*: that and no more. *Roppel* v. *Bennett* (1) cited for the tenants and relied on by the county court judge is a good illustration of the distinction I have indicated between the two purposes for which a dwelling-house can be "a dwelling-house to which the Act applies." For the purposes of the claim, which was a claim to possession, the house (a substantially furnished house) was held by virtue of proviso (i) to sub-s. 2 of s. 12 of the Act of 1920, the predecessor of s. 3, sub-s. 2 (*b*) of the Act of 1939, not to be a dwelling-house to which the Act applies ; but for the purposes of the counterclaim, namely, for recovery of rent overpaid, it *was* held to be "a dwelling-house to which the Act applies" within the meaning of s. 9, sub-s. 1 of the Act of 1920.

That case is binding on this court and in my view conclusive of this appeal on this particular point. But out of respect for the argument addressed to us on behalf of the landlords and seeing that this point was not expressly taken before the court in that case, I will refer to one or two other considerations which, in my view, point in the same direction. Section 3, sub-s. 2 (*b*) of the Act of 1939, opens with the words "save as "is expressly provided in the said Acts," and I am clearly of opinion that s. 9, sub-s. 1 of the Act of 1920, expressly provides otherwise. For simplicity, and to deal with an argument much relied on for the landlords, I will first consider the meaning and interaction of these two provisions as at a time after the Act of 1920 had come into force, but before that of 1923 had done so. In this period the proviso to sub-s. 2 of s. 12 of the Act of 1920 prima facie removed from the protection of the Act, for all purposes (whether limitation of rent or protection from eviction), all houses let furnished.

(1) [1949] 1 K. B. 115.

But its opening words are and were: "save as otherwise "expressly provided." These words in effect carved out an exception in the proviso to the extent of the operation of s. 9 of the Act of 1920. This section again applied then to all furnished lettings and conferred the protection given by the section—not indeed from eviction, but only from uncontrolled rises in rent—in the cases of "any dwelling-house to which "this Act applies." In this context, this last phrase could only mean dwelling-houses within the limits of rateable value (or in 1920, of rateable value or standard rent) set out in the relevant section of the Act in force from time to time. On the landlords' view of its meaning, s. 9, sub-s. 1 of the Act of 1920 could not have operated on anything. On that view, s. 9 applied to dwelling-houses let furnished "to which this "Act applies," and the proviso to s. 12, sub-s. 2 says there are no such houses.

But, it was argued, we are not living in 1920, or 1921, or 1922, and the proviso has since 1923 been qualified by s. 10 of the Act of that year. This section limits the operation of the proviso (where furniture is concerned) to what may be called, for short, substantially furnished lettings. Hence, so the argument runs, when you go back to s. 9, sub-s. 1, and construe the phrase "dwelling-house to which this Act "applies" in that sub-section, you must make allowance for the change introduced by the 1923 Act. The phrase now means dwelling-houses (of course with a standard rent or rateable value (now rateable value) within the limits specified in the Acts) let furnished, but not substantially furnished, for the latter are taken out of the Acts by the proviso and the Act of 1923. The judge has found that the flat in this case was let *substantially* furnished (this is implied in his expression "fully furnished"). Ergo, the flat is not a "dwelling-house "to which this Act applies" within the meaning of s. 9, sub-s. 1 of the Act of 1920, and no claim lies under that sub-section. I do not find this argument convincing, apart from its being contrary to the ratio on which *Roppel* v. *Bennett* (1) was decided by this court. If before 1923, a "dwelling-house "to which this Act applies" in s. 9, meant no more than a dwelling-house within the limits of the rateable value (or rent) laid down by the Acts, the enactment of s. 10 of the Act of 1923 has not in my view given it a wider meaning. The phrase continues to mean what it then did and no more. But the point can be left open, as it was left open in *Riordan* v. *Minchin* (1), since in this case there was a "substantially" furnished letting and such lettings are for reasons given above certainly covered by s. 9.

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(1) [1949] 1 K. B. 115.

The answer to the landlords' first point may be summarized thus: (*a*) Section 9 only applies to "any dwelling-house "to which this Act applies." (*b*) The body of s. 12 (as amended by subsequent Acts) and now s. 3, sub-s. 1 of the Act of 1939, defines such dwelling-houses as dwelling-houses whose standard rent or rateable value and now, since 1939 rateable value, does not exceed certain prescribed figures. (This flat so far is within the class as defined.) (*c*) But from this class of dwelling houses the proviso to s. 12, sub-s. 2 of the Act of 1920 and now s. 3, sub-s. 2 (*b*) (as modified by s. 10 of the Act of 1923) prima facie excepts dwelling-houses let at a rent a substantial amount of which is referable to attendance or furniture. (This flat is within the class so excepted.) But (*d*) The proviso is prefaced with the words "save as otherwise expressly provided," and s. 3, sub-s. 2 (*b*) by the words: "Save as is expressly provided in the said "Acts." These words carve out an exception from the exception, to the extent of the operation of ss. 9 and 10, to which alone they can refer. This flat is within the exception to the exception and therefore is a "dwelling-house to which "this Act applies" within the meaning and for the purposes of s. 9, sub-s. 1. For a different purpose—recovery of possession—the flat could be outside the protection of the Acts.

But the landlords rely, and rely more strongly, on a second point. This is that, assuming that counsel is wrong on his first point, nevertheless s. 9, sub-s. 1, while it applies in its terms to tenancies where the rent covers occupation of the premises plus the use of furniture, does not apply in its terms to tenancies where the rent covers occupation of the premises, plus the use of furniture plus attendance, or any other extra besides furniture, for example, board. In the absence of some clear implication from the context or otherwise, imparting a special meaning to the words used in a statute, they are to be construed in their ordinary literal and grammatical meaning. What is the ordinary grammatical meaning of s. 9, sub-s. 1? According to this standard the words "let . . . at a rent which "includes payment in respect of the use of furniture" would appear to be satisfied where the rent includes such payments and also payments in respect of attendance. A lease is none the less a lease at a rent covering the use of furniture, because the rent also covers some other extra. A man wearing a hat and a coat is none the less a man "wearing a hat" because he is also wearing a coat. It is not clear why after "furniture" we must read in the words "and no other extra."

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(1) [1949] 1 K. B. 137.

The present tenancy seems therefore to fall within the words in question. It is quite true that such a construction would enable the county court judge, on proof that the rent included an element attributable to the use of furniture, to control the whole rent, notwithstanding that it also included elements attributable to other components, for example, attendance or board or both; and that one can imagine cases in which these other components might be very large. That is true, but it seems to me a result which, though possibly unintended, flows from the words used construed in their primary sense. The sub-section goes on to provide that where "it is proved to the satisfaction of the county court " . . . . that the rent charged is yielding, or will yield to the "landlord a profit in excess of the normal profit," the court may order the excess to be irrecoverable. In this passage, the words "rent charged," again construed in their ordinary meaning, must mean the rent in fact charged, under the lease in question, and if that rent covers furniture plus attendance or some other extra, it is none the less the rent charged; and it is in relation to that rent that the county court judge must perform the calculation prescribed by the section. I cannot see that there is any clear or necessary implication from the context or otherwise to modify the construction which I have indicated. It has been suggested that in a case in which the rent includes use of furniture, plus some other extra, for example attendance, the county court judge in applying s. 9, sub-s. 1, and comparing the profits with the corresponding 1939 "normal" profits, should ascertain, and eliminate from both sides of the account, the element attributable to attendance. But this section does not say so; it is not a necessary implication; and it would add yet another baffling complication to a task, complex enough already in all conscience, which the Acts impose on county court judges.

For these reasons I am of opinion that the appeal, though very ably argued, should be dismissed.

C. A.
1949

LEDERER
v.
PARKER.

BUCKNILL L.J. I also think that the appeal should be dismissed.

HODSON J. I agree.

Appeal dismissed.

Solicitors for the landlords: *Amery-Parkes & Co.*
Solicitors for the tenants: *Good, Good & Co.*

C. G. M.

1949
July 26.

Lord Goddard C.J.,
Oliver and
Stable JJ.

MANLEY *v.* DABSON

MANLEY *v.* SAME

Road Traffic—Goods vehicles—Keeping of records—Exemption where "vehicle" used in the business of agriculture—Conveyance by farmer of vegetables for sale by retail—Goods Vehicles (Keeping of Records) Regulations, 1935 (*St. R. & O.*, 1935, *No.* 314), *reg.* 6.

The duty to keep records imposed by reg. 6 (1) of the Goods Vehicles (Keeping of Records) Regulations, 1935, is stated by para. 3 (*a*) of the regulation not to apply in the case of a vehicle used in "the business of agriculture."

On the true construction of para. (3) (*a*), a farmer using a motor vehicle for the purpose of taking produce grown on his farm to a customer is using it "in the business of agriculture," and so within the exemption, whether the customer is buying wholesale, that is, for the purpose of selling again, or buying retail, that is, for his own consumption.

Where, therefore, a farmer delivered green vegetables grown on his farm to the proprietor of a hotel 2½ miles away in a goods vehicle owned by the farmer and driven by his wife,

Held, that the vehicle was being "used in the business of "agriculture," and that the farmer's wife, as driver, and the farmer as holder of the licence in respect of the vehicle were accordingly under no obligation respectively to carry or to keep or cause to be kept the records prescribed by reg. 6 (1).

CASES STATED by Sussex justices.

At a court of summary jurisdiction sitting at Petworth an information was preferred by the respondent, William John Dabson, Superintendent of Police, under s. 16 of the Road and Rail Traffic Act, 1933, against the appellant, George Egerton Lambert Manley, a farmer, alleging that on February 2, 1949, at West Chiltington, being the holder of a " C " licence in respect of an authorized vehicle—a " utility " motor-car—he unlawfully failed to keep a current record of a journey of the vehicle, contrary to reg. 6 (1) of the Goods Vehicles (Keeping of Records) Regulations, 1935 (1). The appellant in the second appeal, Dorothy Manley, the farmer's wife, who was driving the car, was charged with failing to carry such a record, contrary to reg. 8.

On the hearing of the information the following facts were proved: the car was owned by the appellant farmer, who had been granted in respect of it a " C " licence as defined in s. 2, sub-s. 4, of the Act of 1933. On February 2, 1949, the car was being driven by the wife of the farmer on the public highway at Mare Hill, Pulborough, Sussex, where it was stopped by a police officer. It was carrying green vegetables in boxes grown on the farmer's farm two and a half miles away. The vegetables were being delivered by the wife on behalf of her husband, who had sold or intended to sell them to the Swan Hotel, Pulborough. The farmer had not kept or caused to be kept a current record of particulars of the journey in accordance with the regulations of 1935, nor was the wife carrying with her or on the car any such record. No dispensation under s. 16, sub-s. 3, of the Act of 1933 had been applied for or granted.

It was contended for the farmer that by virtue of reg. 6 (3) (*a*) it was not necessary for any records under the regulations to be kept, since the vehicle was being used in the business of agriculture and was within a radius of twenty-five miles from the place where it was usually kept.

It was contended for the prosecutor that the car was being used for marketing or retailing goods, and so was not at the relevant time being used in the business of agriculture.

The justices were of opinion that the car was not at the time

(1) By reg. 6 of the Goods Vehicles (Keeping of Records) Regulations, 1935: " (1) .... every " driver shall keep and every " holder of a licence shall cause " to be kept a current record " divided into periods of 24 " consecutive hours which shall " give in respect of each such " period during which or during " any part of which the driver " was employed in driving " certain prescribed information . . . (3) (*a*): " In the case of a vehicle " used in the business of agri- " culture it shall not be necessary " for the driver or the holder " of a licence to keep or cause " to be kept the records pre- " scribed by these regulations, " except in the case of journeys " during the course of which " the vehicle is used outside a " radius of 25 miles from the " place where the vehicle is " usually kept."

1949

MANLEY v. DABSON. MANLEY v. SAME.

of the journey being used in the business of agriculture, in that use for marketing or delivering green vegetables on sale by retail to an hotel was not such a use. The farmer and his wife, having been convicted and fined 1*l.* each, now appealed.

Cussen for the appellants, the farmer and his wife. It is submitted that this vehicle was clearly used in the business of agriculture. The only way in which a farmer can live is by selling his produce, and it is surely absurd to hold that a vehicle in which that produce is actually being delivered to a buyer is not being used in the business of agriculture. [He was stopped.]

Harold Brown for the prosecutor. It is submitted that a farmer is not using a motor vehicle in the business of agriculture if he uses it to deliver goods for sale by retail. There are plenty of other uses which do fall within the description "business of agriculture." If the delivery of these vegetables for sale by retail is one of them, it follows that a vehicle in which a milk roundsman delivers milk is being used in the business of agriculture. As authority for the proposition that "agriculture does not include selling and distributing milk by "retail," an unreported case, *Fillingham* (*Arthur*) *& Sons* v. *Hall* (1) is cited in Stone's Justices' Manual, 80th ed., p. 2077, and that case would seem to be conclusive in favour of the prosecutor here.

LORD GODDARD C.J. [after stating the facts]: The justices, who obviously took trouble over this case, were referred to *Fillingham* (*Arthur*) *& Sons* v. *Hall* (1), which is quoted in Stone's Justices' Manual, 80th ed., at p. 2077, as authority for the proposition that "agriculture does not include selling "and distributing milk by retail." We have not the advantage of any report of that case. On the true construction of the expression "used in the business of agriculture," it seems to me, a farmer is using his vehicle in the business of agriculture if he is taking the produce grown on his farm for sale, for that is the only way in which he can carry on the business of agriculture. The words are not "used in agriculture" but "used "in the business of agriculture," that is to say, in the business of a farmer. I cannot read those words in any other way. There is nothing more akin or appurtenant to the business of a farmer than selling the produce which he grows on the farm.

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(1) October 30, 1935. Not reported.

Mr. Brown has conceded that if the farmer had been taking the goods to market he would have been within the exception in para. (3) (*a*) of reg. 6. I cannot myself see why, if it was in order for him to sell the goods in the market place, it could make any difference that, instead of going to the market, he went to a particular customer. He goes to market to find customers. If he has already found one, it seems to me, he is still using the vehicle in his business—that is to say, the business of agriculture.

We are not left altogether without authority, for it was said by this court in *Flatman* v. *Poole* (1) that the meaning of the exception was obvious: the purpose of the records was to prevent the use of motor vehicles on the highway for such a continuous stretch of hours as to deprive the drivers of suitable opportunity of rest, the safety of persons on the highway being thereby imperilled. To suppose that such regulations would be applicable to vehicles used in the business of agriculture was sufficiently fantastic; but they were expressly exempted. In the case cited, the vehicle was loaded with agricultural implements and furniture being moved from one farm to another. If that was said to be the business of agriculture, I cannot see why the taking of agricultural produce for sale is not an a fortiori case. It might have been said of the farmer in *Flatman* v. *Poole* (1) that he was nothing more than a removal contractor; that he was removing goods and furniture from one farm to another; and that he was not carrying on agriculture if he was moving from one farm to another. In fact, however, he had been carrying on business at one farm and wanted to carry it on at another. I look at the language of the regulation: if it had been desired to provide that a vehicle was not to be deemed to be used in the business of agriculture if the purpose of the use was for sale by retail, that could have been done expressly.

The case also seems to be singularly like *London County Council* v. *Lee* (2), which arose under the Locomotives Act, 1898. By s. 17 of that Act the expression "agricultural "locomotive" includes any locomotive the property of one or more owners or occupiers of agricultural land employed solely "for the purposes of their farms," and not let out on hire. "A locomotive drawing to market trollies with produce "intended for sale" was held to be used for the purpose of a farm.

(1) [1937] 1 All E. R. 495.

(2) [1914] 3 K. B. 255.

In my opinion, on the true construction of this regulation, a farmer who is using his vehicle for the purpose of taking produce grown on the farm to a customer, whether the customer is buying wholesale, that is, for the purpose of selling again, or buying retail, that is, for the purpose of his own consumption, is within the exception. Therefore, these appeals should be allowed.

OLIVER J.: I agree.

STABLE J.: I agree.

Appeals allowed.

Solicitors for the appellants: *Bartlett & Gregory.*

Solicitors for the prosecutor: *Walmsley & Stansbury, for J. E. Dell & Loader, Shoreham.*

R. C. C.

C. A.
1949
Mar. 22.
Lord Goddard C.J., Bucknill and Denning L.JJ.

CLARKE *v.* GRANT AND ANOTHER.

Landlord and tenant—Notice to quit—Subsequent acceptance of rent—No operation as waiver of notice.

The principle whereby a landlord's acceptance of rent from a tenant, after the latter has incurred liability to forfeiture of the lease through breach of covenant, operates to waive the right of forfeiture has no application where the landlord has given notice to quit and thereafter accepts rent from the tenant. In such a case the acceptance of rent has no effect on the notice to quit unless it be established that it was the intention of the parties, by paying and accepting the rent, to create a new tenancy.

Where, therefore, after a yearly tenancy had been duly determined by notice to quit, the landlord's agent accepted rent from the tenant because he mistakenly believed it to be paid in arrear and so referable to a period before the end of the lease whereas the tenant was purporting to pay it in advance in accordance with the terms of the lease,

Held, that the acceptance of rent did not operate to revoke the notice to quit in the absence of evidence of any intention to create a new tenancy.

Davies v. *Bristow* [1920] 3 K. B. 428, approved.

Hartell v. *Blackler* [1920] 2 K. B. 161, overruled.

APPEAL from Deputy Judge Smylie sitting at Birkenhead county court.

C. A.

1949

CLARKE
v.
GRANT.

The defendants, Joseph Thomas Grant and Harry Rogers, were holding over as yearly tenants, at a rent of 75*l.* a year, of a house at No. 332, Borough Road, Birkenhead, belonging to the plaintiff, Arthur Rawson Clarke. On March 26, 1947, the tenants received from the landlord a valid notice to quit on April 30, 1948. Nevertheless early in May, 1948, the tenants paid to the landlord's agent a sum of money equivalent to one month's rent. The agent stated, in evidence which was not challenged, that he received that sum in the belief that it was for rent which had accrued due, that was, for rent in arrear for the previous month. In fact the rent had always been paid in advance. Therefore the agent was mistakenly accepting as rent paid for the month that had expired a sum which the tenant was paying as rent in advance.

On those facts, there being no other evidence of any agreement between the parties, the county court judge held that the notice to quit had been waived, and he dismissed the action.

The landlord appealed.

C. J. I. Cunningham for the landlord.
Robertson Crichton for the tenants.

LORD GODDARD C.J. [after stating the facts :] The county court judge has fallen into the error of confusing an acceptance of rent after a notice to quit with an acceptance of rent after notice that a forfeiture has been incurred. It has always been held that, if a landlord seeks to recover possession of property on the ground of a breach of covenant which entitles him to claim a forfeiture, acceptance of rent thereafter waives the forfeiture, for the reason that the landlord, where liability to a forfeiture has arisen, has the option of saying whether he will treat the breach of covenant as incurring a forfeiture or whether he will not. The breach makes the lease voidable ; it does not make it void. It has always been held that if the landlord accepts rent after notice of forfeiture he thereby acknowledges that the lease is continuing.

With regard to the payment of rent after a notice to quit, however, that has never been the law : if a notice to quit has been given in respect of a periodic tenancy such as a yearly tenancy, the result is to bring the tenancy to an end just as effectually as if there had been a term which had expired. Therefore, when a landlord has brought a tenancy to an end

C. A.

1949

CLARKE
v.
GRANT.

Lord Goddard C.J.

by means of a notice to quit, a payment of rent after that date will only operate in favour of the tenant if it can be shown that the parties intended that there should be a new tenancy. A new tenancy must be created. That has been the law ever since it was laid down by the Court of King's Bench, presided over by Lord Mansfield, in *Doe d. Cheny* v. *Batten* (1). I need not read the judgments in extenso, but Lord Mansfield said (2): "the question therefore is, quo animo the rent was received, "and what the real intention of both parties was."

It is impossible to find that the parties here intended that there should be a new tenancy. The landlord was all the time desiring to have possession of the premises: that is why he had given his notice to quit. The mere mistake of his agent in accepting as rent which had already accrued rent which was in fact payable, if it was payable at all, in advance, cannot be used to establish that the landlord was agreeing to a new tenancy.

The importance of this case is that it gives this court an opportunity of overruling once and for all *Hartell* v. *Blackler* (3). That case was unfortunately argued on one side only, and the court, with all respect, fell into exactly the same error as the deputy county court judge here—that of confusing an acceptance of rent after a notice of forfeiture with acceptance of rent after the expiration of a notice to quit. The court there applied the doctrine of waiver by acceptance of rent after notice of forfeiture. Indeed, it based its judgment on the well-known case of *Croft* v. *Lumley* (4), and held accordingly that, where a landlord had accepted rent after a notice to quit had been given, he had given up all his benefit under the notice to quit.

Hartell v. *Blackler* (3) was expressly dissented from by another Divisional Court in *Davies* v. *Bristow* (5). *Hunt* v. *Bliss* (6) was unfortunately not brought to the notice of the court in *Hartell* v. *Blackler* (3). The Divisional Court in *Davies* v. *Bristow* (5), faced with two conflicting decisions, followed that which it thought right, and Lush J., in a most convincing judgment, explained why he preferred *Hunt* v. *Bliss* (6) to *Hartell* v. *Blackler* (3).

Now that this point has come before the Court of Appeal, I can say without any hesitation that *Hartell* v. *Blackler* (3)

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(1) (1775) 1 Cowp. 243.
(2) Ibid. 245.
(3) [1920] 2 K. B. 161.
(4) (1855) 5 E. &. B. 648.
(5) [1920] 3 K. B. 428.
(6) [1919] W. N. 331.

C. A.

1949

CLARKE
v.
GRANT.

Lord Goddard C.J.

was wrongly decided and must be taken to be overruled. It is in my opinion quite clear that there is no evidence here on which the deputy county court judge could find a new agreement. He did not apply his mind to the question whether there was a new agreement in fact because, as I say, he relied upon the acceptance of rent as itself conclusive of a waiver when, strictly, no waiver comes into the case; but we can reverse his judgment, because in my opinion there is no evidence on which a new agreement could be inferred. The consequence is that this appeal must be allowed.

BUCKNILL L.J. I agree.

DENNING L.J. I agree.

Appeal allowed.

Solicitors for the landlord: *George A. Herbert for Edward A. Simans, Birkenhead.*

Solicitors for the tenants: *Ranger, Burton & Frost, for G. F. Lees & Son, Birkenhead.*

R. C. C.

Considered. COMBE *v.* COMBE [1951] 2 K. B. 215

GAISBERG *v.* STORR.

C. A.

1949
July 18.

Bucknill, Cohen and Asquith L.JJ.

Contract—Divorce—Wife's petition on ground of adultery—Agreement by husband to pay 3l. a week alimony from date of decree nisi—No consideration for undertaking—Construction—Meaning of alimony."

A wife petitioned for divorce on the ground of her husband's adultery and also for alimony pendente lite. The husband signed a document: "I agree and undertake to pay to my wife . . . . "the sum of three pounds per week alimony as from the date "of the decree nisi being pronounced in these proceedings" and he handed this document to the wife's solicitor. The husband paid his wife 2*l.* 10*s.* 0*d.* under a separation agreement of a date earlier than the petition for divorce, until the date of decree nisi and 3*l.* per week pursuant to the undertaking contained in the above-mentioned document from the date of decree nisi up to the date when the decree was made absolute and, thereafter, until his former wife remarried about eleven months after the date of decree absolute. He then ceased making any payment to his wife, who claimed payment of 3*l.* a week under her former husband's undertaking.

C. A.

1949

GAISBERG
v.
STORR.

Held, that the only consideration for the husband's undertaking moving from the wife, which could be deduced by inference from the circumstances, would be an undertaking by the wife not to apply to the court for alimony pendente lite or for permanent maintenance, but any promise by the wife to refrain from so applying was void and unenforceable: see *Hyman* v. *Hyman* [1929] A. C. 601. The husband's undertaking, therefore, was nudum pactum.

Held also, that even were the undertaking a contract, the husband's undertaking, by reason of the meaning of the word "alimony," strictly read, was merely to make this payment from the date of decree nisi to that of decree absolute. It could not be supposed that the husband ever intended to bind himself to pay 3*l*. a week to his former wife, if she married again.

APPEAL from Watford county court.

The parties were married in July, 1925, and there was one child of the marriage, born in 1930. On November 15, 1945, they entered into a separation agreement in the usual form by which the husband agreed that he would during the joint lives of the spouses pay to the wife 2*l*. 10s. a week. Provision was made that, should the spouses again cohabit as man and wife for the continuous period of not less than three months, the allowance should determine and the provisions of the agreement become void. Bucknill L.J. expressed the view that the agreement was intended to deal only with the state of things whilst the spouses remained married. The husband paid the allowance of 2*l*. 10s. 0*d*. regularly.

On February 11, 1947, the wife petitioned for divorce on the ground of her husband's adultery and also for alimony pendente lite and costs. The husband (after an interview with a clerk to the wife's solicitor) signed the following statement, written on notepaper of the wife's solicitor, with his address thereon and dated March 27, 1947: "*Storr* v. *Storr*: I, George Leonard Storr . . . . hereby "agree and undertake to pay to my wife Muriel Nellie Storr "the sum of three pounds per week alimony as from "the date of the decree nisi being pronounced in these "proceedings." He handed this document to the wife's solicitor.

On August 8, 1947, the wife obtained a decree nisi. On October 25, 1947, the decree was made absolute, and at the end of September, 1948, Mrs. Storr married Erwen von Gaisberg. Mr. Storr paid Mrs. Storr 2*l*. 10s. under the separation agreement until the date of the decree nisi, and

3*l*. per week from that date up to the date when the decree was made absolute and thereafter until his former wife remarried. Mr. Storr then ceased to make any payments to his wife.

The wife then claimed in the county court the sum of 3*l*. per week under the document signed by Mr. Storr dated March 27, 1947, as from her remarriage. The only witness called was Frau von Gaisberg. She said: "I took no steps to get "a court order for maintenance. I took it for granted the "solicitor was looking after my interest and I left everything "to him. The agreement of March 27, 1947, was in my "possession." In cross-examination she said: "The agree-"ment was sent to me by my solicitor. I was expecting it. "I gave no undertaking in return for it and did nothing in "return for it; I regarded it as permanently regulating the "position. I did not understand about alimony proceedings. "I did not really bother my head about the question. I did "not know how defendant interpreted the agreement. Mitchell "was my solicitor. I saw him about the divorce, i.e. instructed "him to issue petition. No answer filed. I was expecting "agreement, because I had consulted solicitors as to finance. "I asked how I stood because I did not want to be left high "and dry and did not know much about it."

His Honour Judge Done said that the effect of the document of March 27, 1947, was that the plaintiff by her solicitor agreed with her husband that the question of her support should be settled between themselves without further resort to the court, and that the wife's rights and husband's obligations as to maintenance were settled between them. It might be that the wife was giving up something—that was uncertain—but she did agree to accept three pounds and that was the consideration. As to the construction of the agreement he said that he thought there was no ambiguity: but, if there were, he should hold that the same construction should apply from the fact that the wife accepted payments at 3*l*. a week and the husband paid them from the date of decree nisi and continued to pay them after decree absolute and that it was not until ten months later that he stopped there and then, not on the ground that the agreement was to apply only up to decree absolute, but on the irrelevant ground that the plaintiff had remarried. The defendant's acts supported the view that the agreement was to pay the sum for their joint lives and he so construed

C. A.
1949
GAISBERG
v.
STORR.

the agreement. (See the judgment of Lord Atkinson in *Watcham* v. *The Attorney-General of the East Africa Protectorate* (1)). Accordingly, he gave judgment for the plaintiff.

The defendant appealed.

Michael Hoare for the defendant. This undertaking by the husband was nudum pactum, since there was no consideration for it. If it is suggested that the consideration was an undertaking by the wife not to apply for alimony pendente lite or for maintenance, but any such promise by the wife was void and unenforceable: *Hyman* v. *Hyman* (2). The husband's undertaking, therefore, was merely an expression of intention which could not be enforced at law. The wife gave nothing and did nothing, in return for it, as she said in her evidence.

If the undertaking can be considered to be a binding agreement, it is merely a consent order with reference to alimony pendente lite. There is no such thing as permanent alimony in divorce, but only after a petition for judicial separation. The agreement must be construed with reference to the pending petition for divorce and it was headed, *Storr* v. *Storr*. Moreover, the wife by her petition had sued for alimony pendente lite. The agreement, if it was a contract, the husband, continuing to pay his wife *2l.* 10*s.* a week under the former separation agreement as he was then doing until the date of decree nisi, would pay instead the sum of *3l.* a week from the date of the decree nisi to that of the decree absolute. It cannot be suggested that this document was to pay the wife permanent maintenance of *3l.* a week. If that were so, to what date was the agreement to extend? For the joint lives of the former spouses, or until the wife should die? And would either of these periods be broken by the wife's remarriage? In the case of ambiguity the contract should be construed contra proferentem,—in this case the wife's solicitor. Verba fortius accipiuntur contra proferentem. [He was stopped.]

Norman King for the plaintiff. There was consideration for this contract, since if proceedings had been taken for maintenance by the husband, he would have incurred costs which would have to be paid by him.

[ASQUITH L.J. But there was no forbearance by the wife].

If the husband was satisfied that he could obtain some advantage, by giving this undertaking, that is enough, although there was in fact no advantage in law. The consideration can be ascertained outside the four corners of the document. Even if the husband obtained a short time before he incurred the costs on a wife's application for maintenance, that would be consideration. And the wife did in fact refrain from taking any steps to obtain from the court either alimony pendente lite or maintenance. *Hyman* v. *Hyman* (1) decides no more than that a covenant in a deed made between the spouses by a wife that she will not take proceedings for alimony or maintenance does not oust the jurisdiction of the court. The mere fact that the wife has said that she will accept a certain sum for maintenance is some evidence that this sum is adequate. It cannot be said that this information is of no value to the husband.

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(1) [1919] A. C. 533, at p. 540.

(2) [1929] A. C. 601.

On the second point, the word "alimony" is not a word of art: it merely means an allowance. The word was used simpliciter without other words: this was not an agreement for alimony pendente lite. It would refer to any payment made by a husband to a wife, after proceedings taken, except, perhaps, a payment for costs. The decision in *Hyman* v. *Hyman* (1) may diminish the value to the husband of this agreement, but it does not extinguish that value. This contract is, in the language of Lord Thankerton in *Kirk* v. *Eustace* (2), clear, simple, unambiguous and intelligible, and it is for the husband to pay to the wife 3*l.* per week, indeed for the life of the wife, since no limit of time is mentioned, and at all events, as the county court judge decided, for their joint lives. [*Finch* v. *Finch* (3) was also mentioned.]

BUCKNILL L.J.: We need not trouble you, Mr. Hoare, to reply. As to the first point, in my view there was no legal consideration for this so-called agreement. It is quite clear from the decision of the House of Lords in *Hyman* v. *Hyman* (1) that "a wife who covenants by a deed of separation "not to take proceedings against her husband to allow her "alimony or maintenance beyond the provision made for her "by the deed, and thereafter obtains a decree for dissolution "of the marriage on the ground of her husband's adultery, "is not precluded by her covenant from petitioning the court "for permanent maintenance." Lord Hailsham said (4): "In 1857 the legislature for the first time gave to the courts

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(1) [1929] A. C. 601.
(2) [1937] A. C. 491, 498.
(3) [1945] 1 All E. R. 580.
(4) [1929] A. C. 601, 608.

C. A.

1949

GAISBERG v. STORR.

Bucknill L.J

" the power to dissolve the marriage tie by a decree of divorce. " Such a decree does not merely affect the relationship of the " husband and the wife, one to another, but it also changes the " status of each of them. In my view the effect of the section " (s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925) " is to give power to the court, as incidental to the " exercise of these powers and as a condition of their exercise, " to compel the husband to make adequate provision for the " support of the wife. Such a provision is not made solely " in the interests of the wife, but also in the interests of third " parties who may deal with the wife or who may, as in the " case of Poor Law Guardians, become responsible for her " sustenance. If this be the proper inference from the language " of the statute, I am prepared to hold that the parties cannot " validly make an agreement either (1.) not to invoke the " jurisdiction of the court, or (2.) to control the powers of the " court when its jurisdiction is invoked."

That being the law, it seems to me that this document which was signed by the husband did not in any way preclude the wife from claiming alimony pendente lite at any time after the petition had been filed, or from claiming maintenance after the decree was made absolute; and, if the agreement did not preclude her from doing that in any way, I do not see what other consideration there can be for the undertaking of the husband. I think it was merely a statement by the husband of what he intended to do after the decree nisi had been granted. He intended to go on paying *2l.* 10*s.* 0*d.* a week until the decree nisi was made, and after that he intended to go on paying *3l.* a week. That being so, I think it was really nudum pactum and is not enforceable at law.

There is a second point on which also, I think, the claim fails, and it is this. The agreement as it stands—if it is a contract—is merely to pay alimony as from the date of the decree nisi. Well, alimony is a phrase which is never used in the Divorce Division to cover payments by a husband to the wife after decree absolute in divorce. It may be used as referring to " permanent alimony " where the marriage tie subsists and there is merely a decree of judicial separation, or it may be used as " alimony pending suit," which covers the period from the filing of the petition until the grant of the decree absolute. But it is never used to cover the period after a decree absolute in divorce has been granted. If one reads this document strictly it seems to me really to cover only that period of time which would elapse from the date of the decree nisi to that of the decree absolute. How long that would be nobody can tell; there may be an intervention by the King's Proctor; there may be a failure by the wife to ask for the decree absolute until her costs have been paid. Many slips may arise between decree nisi and decree absolute. But that is what the document means and nothing more.

It is contended, however, that the undertaking must mean something more than that. There must have been an intention to deal with the period after decree absolute. That may be, but if one is to interpret this document on the grounds of reason and common sense, it seems to me quite impossible to suppose that the husband ever intended to bind himself to pay 3*l*. a week to his wife, if she married again—perhaps married a man who was far more able to support her than the defendant. She might marry two or three times, according to the construction which the wife put upon this document; nevertheless the defendant has to go on paying her 3*l*. a week. I do not know whether it is suggested that the contract is to bind his executors and to make them liable to pay the 3*l*. until the wife dies, or whether it is suggested that the undertaking ends with his death. It is significant, I think, that whilst the separation agreement provided for a payment to the wife during their joint lives, there is no such expression in this document of March 27, 1947. Even if that document contained a contract, reading it in a reasonable way, it cannot be said to bind the defendant to pay this sum after the plaintiff had married again. In my judgment, on both grounds this appeal should be allowed.

COHEN L.J.: I am of the same opinion and I only desire to add a few observations on one point. The county court judge relied on the decision in *Watcham* v. *The Attorney-General of the East Africa Protectorate* (1), where Lord Atkinson, in giving the reasons of the Privy Council, said (2): "These cases"—cases he had cited—"their Lordships think, "establish the principle that even in the case of a modern "instrument in which there is a latent ambiguity, evidence "may be given of user under it to show the sense in which "the parties to it used the language they have employed, and "their intention in executing the instrument as revealed by "their language interpreted in this sense." The county court judge in the present case came to the conclusion that

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(1) [1919] A. C. 533.

(2) Ibid. 540.

C. A.
1949
Gaisberg v. Storr.
Cohen L.J.

the defendant's acts supported the view that the defendant was to pay alimony for the joint lives of himself and his wife. In my opinion the *Watcham* case (1) requires to be applied with care, and certainly, before it can be applied here, it must be shown (a) that there is a contract, and (b) that the acts which are relied on unequivocally support the construction which the court is invited by counsel, relying on them, to adopt. In the present case it is by no means clear that there is a contract. I need not go further into that point; suffice it to say that I agree with the observations on it made by my brother Bucknill. In the second place, even if there were a contract, the acts relied on are as consistent with the agreement coming to an end on the remarriage of the wife, as with its continuing during the joint lives of the husband and the wife. In those circumstances the *Watcham* case (1) does not appear to me to support the conclusion which the county court judge reached. I agree that the appeal should be allowed.

Asquith L.J.: The wife's counsel, in the course of an ingenious argument, has described the document as clear, simple, unambiguous and intelligible. With great respect, I cannot agree. The document specifies the date on which the payments are to begin, but not for how long they should continue or in what event, if any, they should cease. The husband agrees to pay the money, but it is doubtful whether he agrees to do so only so long as she remains his wife or longer; he agrees to pay, leaving it uncertain whether what he is to pay is something corresponding to alimony pendente lite or something corresponding to permanent maintenance, or, as seems probable, something corresponding to neither.

This is not clear or simple, but it is clear that nowhere on the face of this document is any consideration specified or even indicated by implication. The evidence, moreover, given by the wife, who was the only witness called, was to the effect that she undertook nothing and did nothing in return for this letter. Her solicitors, who obtained on her behalf a signature to the letter, were not called. The only consideration which could be deduced by inference from the circumstances would be an undertaking by the wife, in exchange for the husband's undertaking, not to apply to the court for alimony pendente lite or permanent maintenance; but any promise given by her to refrain from so applying would have

(1) [1919] A. C. 533.

been void and unenforceable on the principle laid down in *Hyman* v. *Hyman* (1). In those circumstances I think that there is no evidence at all of any consideration moving from the wife to the husband, and that the agreement in the document is not a binding contract. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for the defendant (the husband): *Michael Abrahams, Sons & Co.*

Solicitors for the plaintiff (the wife): *Julius White and Bywaters, for Penman, Johnson & Ewins, Watford, Herts.*

(1) [1929] A. C. 601.

C. G. M.

FRED LONG & SON LD. *v.* BURGESS.

C. A.
1949
July 14, 25.
Bucknill and Asquith L.JJ. and Hodson J.

Landlord and tenant—Death of contractual tenant intestate—Notice to quit served on President of P. D. and A. Division—Termination of contractual tenancy—Son of deceased tenant, living with her, continues in possession—Subsequently son obtains letters of administration—Doctrine of "relation back" invoked—Contention that administrator was contractual tenant when notice to quit served—Claim to hold over as statutory tenant.

The contractual tenant of a dwelling-house, subject to the Rent Restriction Acts, died intestate on November 7, 1948. On November 18, 1948, the landlords served a notice to quit the house, expiring on November 27, 1948, on the President of the Probate, Divorce and Admiralty Division of the High Court, in whom by virtue of s. 9 of the Administration of Estates Act, 1925, the deceased tenant's real and personal estate (including her tenancy of the dwelling-house) had vested, in the same manner, and to the same extent, as formerly, in the case of personal estate, it vested in the ordinary. The two sons of the late tenant had continued in occupation of the house and a week later the landlords brought an action in the county court claiming to recover possession of the house from the sons, who relied on the Rent Restriction Acts. When the case was part heard, the defendants applied for, and were granted, an adjournment in order that they might obtain a grant of letters of administration of the estate of their mother. At the resumed hearing one of the sons produced letters of administration granted to him on January 15, 1949, and the county court judge held that by the doctrine of "relation back,"

C. A.

1949

FRED LONG & SON, LD. *v.* BURGESS.

as expounded by Luxmoore L.J. in *Ingall* v. *Moran* [1944] K. B. 160 at p. 168, the estate of the deceased tenant from the time of her death was vested in the administrator, who was, at the time the notice to quit expired, the contractual tenant thereof and, as such, was entitled to continue in possession of the house as a statutory tenant. On appeal by the landlords :—

Held, allowing the appeal, that (1.) the notice to quit the house served on the President terminated its tenancy on November 27, 1948; (2.) the grant of letters of administration to a son of the deceased tenant did not so relate back to the date of her death as to bring to life the terminated tenancy; and (3.) the doctrine of "relation back" did not place the administrator in the same position as the President when notice to quit was served on him.

Smith v. *Mather* [1948] 2 K. B. 212, and *Thynne* v. *Salmon* [1948] 1 K. B. 482, considered.

Held, accordingly, that it was unnecessary to decide whether the landlords succeeded on the point that when the defendants were first before the court they had no defence and that the case was adjourned to allow them, by obtaining letters of administration, to acquire one; and also on the point that the issue in the county court was whether at the time the plaint note was delivered to the landlord, or issue joined, the defendants had any defence to the claim.

Per Curiam : There was much force in the landlord's contentions: (1.) that the doctrine of the "relation back" of letters of administration must not be applied, save to protect the estate from wrongful injury occurring in the interval between the death and the grant of letters of administration; (2.) that a title cannot relate back, if it is a title to something which has perished or been extinguished without fault or wrong on the part of anyone, during the said interval; (3.) that the principle of "relation back" cannot be applied to invalidate interests lawfully acquired in the said interval; and that to apply that doctrine in circumstances, such as those of the case before the court, would leave a landlord, it might be for years, in a position of intolerable doubt as to his rights, e.g., whether he would be safe in re-entering the premises and dealing with them by sale or re-letting.

APPEAL from Great Yarmouth county court.

From 1943 Mrs. Burgess lived at 121, Lichfield Road, Yarmouth, with her two sons Alfred and Clifford Burgess, under a contractual tenancy at a rent, inclusive of rates, of 9*s*. 3*d*. a week. On November 7, 1948, Mrs. Burgess died intestate, and on November 18, her landlords, the plaintiffs, served a notice to quit No. 121, Lichfield Road, on the President of the Probate, Divorce and Admiralty Division, in whom by virtue of s. 9 of the Administration of Estates Act, 1925, her real and personal estate had vested in the same manner and to the same extent as formerly, in the case of personal estate, it vested in the ordinary. This admittedly operated to determine the contractual tenancy, on November 27, 1948. Alfred and Clifford Burgess continued to occupy the house: and a week later the landlords brought an action in the Great Yarmouth county court claiming the recovery of possession of the premises from them. By their defence, the defendants claimed the protection of the Rent Restriction Acts.

His Honour judge Carey Evans, at the first hearing on January 6, 1949, held that Mrs. Burgess at the time of her death was a contractual, and not a statutory, tenant. The solicitor for the tenants admitted that no grant of letters of administration had been applied for. The case of *Smith* v. *Mather* (1) was cited; and, the evidence for the tenants having been given, the solicitor for the tenants asked for an adjournment to enable the defendants or one of them to take out letters of administration. The note of the judge was: " Adjournment was not opposed by the solicitor " for the plaintiffs, though he will contend that the defendants " have no defence, even if letters of administration are granted." The case was then adjourned.

At the second hearing on February 10, 1949, letters of administration dated January 15, 1949, were produced in the name of Clifford Burgess. The judge held that by the doctrine of "relation back," as expounded by Luxmoore L.J., in *Ingall* v. *Moran* (2), the estate of Mrs. Burgess (including her contractual tenancy of 121, Lichfield Road), from the time of her death, was vested in the administrator. Clifford Burgess, therefore, was the contractual tenant at the moment of the determination of the tenancy (see s. 12, sub-s. 1 (*f*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920) and, as such, was entitled to hold over as statutory tenant. The judge said that his decision did not conflict with *Smith* v. *Mather* (1) because in that case there never was a grant of administration, and that the "fatal conflict" envisaged in *Thynne* v. *Salmon* (3) did not arise in this case, because the President was the only person in whom the tenancy vested, until the grant of administration and, as from the date of the grant, by virtue of the doctrine of "relation " back," the administrator alone was deemed in law to have been the person in whom the tenancy vested. In conclusion,

(1) [1948] 2 K. B. 212.
(2) [1944] K. B. 160, 168.
(3) [1948] 1 K. B. 482.

he said: "It is very important to interpret *Smith* v. *Mather* "(1) in the light of the facts before the Court of Appeal, and "to remember that they were not considering at all the "effects of the doctrine of 'relation back.'" Accordingly, he gave judgment for the tenant, refusing the landlord's claim for possession. The landlords appealed.

Stephen Chapman and *Norman King* for the landlords. [Their argument is fully summarized in the judgment of ASQUITH L.J.]

The defendants did not appear and were not represented.

Cur. adv. vult.

July 25. BUCKNILL L.J.: This appeal raises an interesting question on the construction and application of s. 9 of the Administration of Estates Act, 1925. The section enacts: "Where a person dies intestate, his real and personal estate, "until administration is granted in respect thereof, shall "vest in the Probate judge in the same manner and to the "same extent as formerly in the case of personal estate it "vested in the ordinary." The section is included in Part II of the Act, which is headed "Executors and Administrators." Section 10 now replaced by s. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, enacts that in granting letters of administration the court shall have regard to the rights of all persons interested in the estate of the deceased person; and s. 16, now replaced by s. 163 of the Supreme Court of Judicature (Consolidation) Act, 1925, deals with the power of the court to grant administration of the estate of a deceased person while legal proceedings are pending touching the validity of the will of the deceased person, or for obtaining, recalling, or revoking any grant of administration. By s. 55 (xv): "'Probate Judge' means the President of the "Probate, Divorce and Admiralty Division of the High Court." Schedule II to the Act repeals a large number of statutes, starting with 13 Edw. I, c. 19. Section 9 of the Administration of Estates Act, 1925, is in effect a re-enactment of s. 19 of the Court of Probate Act, 1858, which was repealed by the Administration of Estates Act, 1925, except that s. 19 applied only to personal estate and effects.

The learned editors of the second edition (1927) of Mortimer's

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(1) [1948] 2 K. B. 212.

Law and Practice of the Probate Division, at p. 280, state that the jurisdiction which the Ecclesiastical Courts exercised over the effects of persons dying without a will rested on a very ancient foundation. In the early periods of legal history the ordinary had by common law the absolute disposal of the personal property of all intestates, but these powers were gradually abridged by Acts of Parliament. Blackstone, in his Commentaries (1), states that the administrators are only the officers of the ordinary, appointed by him in pursuance of the statute 31, Edw. III, st. 1, c. 11, and that their title and authority were derived exclusively from the ecclesiastical judge by grants which are usually denominated letters of administration. Eventually, in 1857, the jurisdiction of the ecclesiastical and all other courts to grant letters of administration was abolished and the jurisdiction was transferred to the newly constituted Court of Probate.

The difficult problem before us, as I see it, raises the following questions : (*a*) did the notice to quit terminate the tenancy on November 27, 1948 ? if so, (*b*) does the grant of administration on January 15, 1949, coupled with the doctrine of " relation " back," bring to life the tenancy which had terminated on November 27, 1948 ? and (*c*) does the doctrine of " relation " back " put the administrator in the same position as the President when notice to quit was served on him and, if so, what effect would the notice to quit on the administrator have in terminating the tenancy agreement ? There seems to be very little authority on the subject. In my opinion, the cases which deal with the doctrine of " relation back " do not have any such similarity to the facts of this case as to enable one to say that the principle contained in them should apply to this case.

I think that, on principle, and, historically, the vesting of the estate in the President is a positive act with some legal substance. Normally the court, formerly composed of the Probate Judge, appoints a person or persons to deal with the property of the intestate through a grant of administration, but I see no reason why in a case of necessity the President should not have legal power to give directions about the property. If he cannot do so, no one can. That is why the property is vested in him. If the President's position is such as I have indicated, I think he must have the legal capacity to receive a valid notice to quit, and such notice, after the

(1) 2 Black. Comm. (1st ed.) 496.

C. A

1949

FRED LONG & SON, LD. *v.* BURGESS.

Bucknill L.J.

proper lapse of time, has full legal effect. If no grant of administration has been made, there is no other person but the President to whom the notice to quit can validly be given. At any date subsequent to the death of the intestate, a grant of administration may be made. There is no time limit in this matter. If a grant made years after the death is to make invalid the notice to quit validly given to the President, confusion and uncertainty will prevail and injustice may be done to those who have acted on the assumption that the notice to quit given to the President had full legal effect. In *Smith* v. *Mather* (1) the facts were similar to this case. The mother was the contractual tenant, and her son and daughter were living with her at the time of her death. The mother died intestate in October, 1946, and in December, 1946, the landlords served notice to quit on the President. No letters of administration were taken out at any time. The county court judge dismissed the landlords' action for possession, but, on appeal, the Court of Appeal held that the notice to the President was valid and that it was the proper procedure for giving effect to the landlords' right to determine the tenancy. The appeal was therefore allowed. It is quite true that the son or daughter did not think of applying for letters of administration during the hearing of the case before the county court judge, but, surely, if they had done so and succeeded in obtaining a grant, the grant must be taken of such property only as the intestate had at the time of the grant, and cannot be taken to include a right of property which had validly been extinguished or transferred.

In argument in *Mather's* case (1), counsel for the defendants submitted that the rule laid down in *Thynne* v. *Salmon* (2) did not apply, because in that case a grant of administration had been made, whereas in *Mather's* case the fatal conflict as to liability for rent between two different persons did not arise, in as much as the President would not become liable to pay rent when the contractual tenancy became vested in him under s. 9 of the Act of 1925. This argument in *Smith* v. *Mather* (1) was rejected by the Court of Appeal. Somervell L.J., at the beginning of his judgment said (3): " In circumstances " such as the present . . . . there must be a power in the " landlord to bring the tenancy to an end by whatever notice " is provided for in the agreement. As it seems to me, the

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(1) [1948] 2 K. B. 212.

(2) [1948] 1 K. B. 482.

(3) [1948] 2 K. B. 212, 214–5.

C. A.

1949

FRED LONG & SON, LD. v. BURGESS.

Bucknill L.J.

" proper procedure for doing that is the procedure adopted " in this case, namely, serving a notice on the President." If, then, the notice terminates the contract, it seems to me that it would be unjust to hold that a subsequent grant of administration brought the dead contract to life. The circumstances under which the grant was made in this case vividly illustrate the sort of injustice which the extension of the doctrine to this kind of case might do. I think the appeal should be allowed.

ASQUITH L.J. I agree. The main grounds on which the appellant landlords' counsel invited us to reverse the decision of the county court judge were the following : (1.) The principle of " relation back," it was argued, has no application where the asset, the administrator's title to which is sought to be antedated by its operation, has ceased to exist by the time when letters of administration are granted. For the title to relate back, it must be a title to something in esse at the date of the grant. A lease extinguished in the interval between the death and the grant (which I will call, for short, " the interval ") is in this respect in just the same position as a chattel lost or destroyed in the interval. The title cannot effectively relate back, for it is a title to nothing. The doctrine of " relation " back " cannot breathe new life into a corpse. (2.) The principle of " relation back," it was further contended, only applies (to quote the language used in Williams on Executors and Administrators (12th edit), vol. 1, at pp. 409–411) " for " particular purposes," and these, when analysed, turn out all to be connected with the protection or preservation of the estate from wrongful injury in the interval. If, in the interval, the estate has been damnified by tortious acts on the part of anyone, or, in the case of leaseholds, by breaches of covenant, then the administrator, though appointed after the acts complained of, can sue in respect of them. The principle of " relation back," however, does not apply outside the limits of the purpose which called it into being. Here it is not necessary to the protection of the estate to invoke it ; ergo it cannot be invoked. (3.) Even where the principle is otherwise applicable, it cannot be so applied as to disturb interests lawfully acquired during the interval : *Waring* v. *Dewberry* (1). In the interval, in the present case, the landlords (the plaintiffs)

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(1) (1718) 1 Stra. 97 cited by Strange arguendo in *R.* v. *Mann* (1726) Gilb. Eq. Rep. 223.

C. A.

1949

Fred Long & Son, Ld. v. Burgess.

Asquith L.J.

by a valid notice served on the President of the Probate, Divorce and Admiralty Division lawfully reabsorbed into their reversion the outstanding leasehold interest which had been vested in the deceased and, thereafter, in the President. They cannot now be divested of this. (4.) It was further argued that to hold that the title related back in such a case as the present might lead to inconvenient, if not intolerable, consequences. For instance, supposing, after validly terminating the President's interest in the tenancy, as they did, the landlords re-entered and occupied the premises themselves or re-let to a third person. Then, perhaps, years later, an administrator is appointed. If his title " relates back," the landlords or their new lessees have been trespassing for years and are liable for mesne profits accordingly, subject possibly to an offset of the rent for which the administrator would have been liable in respect of that period. Or supposing the landlord, after re-entering, had sold the freehold to X, who had mortgaged it to Y or let it to Z. The application of the doctrine of " relation back " would create chaos in such a case. (5.) Lastly, it was said that, assuming all the above contentions fail, the trial below was in any event vitiated by the improper action of the county court judge in proposing and ordering an adjournment, at a time when the defendants had no defence whatever, so as to allow them to try, by obtaining administration, to acquire one; and that, even if such action was not improper, its sequel, the grant of administration to one of the defendants, could not affect the issues which were raised on the pleadings, and which alone the judge had to determine, namely, whether at the time of the plaint or joinder of issue the defendants had any defence.

The argument on the defendants' side in the county court followed these lines: (1.) The principle of " relation back " vests any leasehold interest (such as the deceased woman's contractual tenancy) in the administrator as from the date of the death: *R.* v. *Horsley* (*Inhabitants of*) (1), so as to enable him to sue on the covenants, subject to his liability for the rents and profits, in respect of the interval. (2.) Therefore the administrator must be treated as having notionally acquired the title to this contractual tenancy on November 7, 1948—at the instant when Mrs. Burgess died. (3.) If he had, the contractual tenancy could never have vested in the President, nor could any notice served, or not served, on the

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(1) (1807) 8 East 405.

President have had any effect on the rights of the parties. The administrator became contractual tenant, in contemplation of law, on November 7, 1948, and nothing has happened since to bring his interest to an end. Subject to the next point, he has never had notice to quit and is still contractual tenant. (4) Alternatively, if the notice to quit served on the President has any relevance or efficacy, this can only be because in such circumstances the President was the administrator's agent or representative to receive it, and because notice served on the President equals a notice served on him, the administrator. But if notice had been served on the administrator, the latter would have been converted from a contractual to a statutory tenant, enjoying the protection of the Rent Restriction Acts, which he has done nothing to forfeit.

In my view, these arguments for the defendants, cannot prevail ; the plaintiff landlords are right, and the appeal should be allowed. It seems to me that there is much force in the contentions advanced for the landlords that the doctrine "of relation back" must not be applied save to protect the estate from wrongful injury occurring in the interval (of which in this case there was none) ; that a title cannot relate back if it is a title to something which has perished or been extinguished without fault or wrong on the part of anyone in the interval ; that the principle of "relation back" cannot be applied so as to invalidate interests lawfully acquired in the interval ; and that to apply it in circumstances such as those of the present case leaves the landlord, it may be for years, in a position of intolerable doubt as to his rights ; for instance, whether or not he can safely re-enter and deal with the property.

These reasons seem to me to require that the appeal should be allowed, and I need express no view as to the argument founded on the adjournment of the proceedings in the county court.

HODSON J. I agree.

Appeal allowed.

Solicitors for the landlords : *Gardiner & Co., for Humphrey Lynde & Elliott, Great Yarmouth.*

C. G. M.

C. A.

HARRISON *v.* HOPKINS.

1949
July 21, 22, 28.

Bucknill, Cohen and Asquith L.JJ.

Landlord and tenant—Rent restriction—Death of tenant intestate leaving six children—One of them, a daughter, living with deceased, continues in possession and takes out letters of administration—Notice to quit then served on daughter—Daughter, a contractual tenant by virtue of s. 12, *sub-s.* 1 (*f*), *of the Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17)*—On expiration of notice to quit becomes a statutory tenant.*

The defendant, the daughter of the contractual tenant of a cottage, subject to the Rent Restriction Acts, lived with him at the cottage from 1942 to June 14, 1948, when her father, the tenant, died intestate, leaving six children alive. The defendant continued to reside at the cottage and on July 7, 1948, obtained the grant of letters of administration in respect of her father's estate. On August 24, 1948, the landlord served on the defendant a notice to quit the cottage, expiring on September 6, 1948. The defendant continued in occupation of the cottage and the landlord sued for possession. There was no evidence that any of the children of the deceased tenant, other than the defendant, had claimed possession of the cottage, or that the defendant had taken any step to divest herself of its possession.

Held, following the observations of Morton L.J. in *Lawrance* v. *Hartwell* [1946] K. B. 553, and of Scrutton L.J. in *Skinner* v. *Geary* [1931] 2 K. B. 546, that the defendant being the administratrix of her father's estate, and in occupation of the cottage at the time when the notice to quit expired, was, at that time, the contractual "tenant" of the cottage within the meaning of the Rent Restriction Acts and, by continuing in occupation, became a statutory tenant under the Acts, since she "derived "title under the original tenant," her father, within the meaning of s. 12, sub-s. 1 (*f*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. In the natural signification of these words a person claiming title as a tenant by devolution was as much within the definition as a person claiming that title by assignment.

Sharpe v. *Nicholls* [1945] K. B. 382, and *Parker* v. *Rosenberg* [1947] K. B. 371, distinguished, since the question before the court in each case was not as to the meaning of the expression "landlord" in the abstract but as to the right of the landlord to possession under para. (*h*) of sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

Appeal from Leicester county court.

In 1928, the plaintiff, the landlord, let a cottage to Joseph Bland at a rent of 4*s*. per week. From 1942 Bland's daughter, Christine, lived with him and, though she subsequently married Bernard Hopkins, she continued to live at the cottage until Bland died, intestate, on June 14, 1948, leaving six children living, of whom Christine Hopkins was one. The cottage was subject to the Rent Restriction Acts. On July 7, 1948, Christine Hopkins obtained letters of administration of her father's estate. On August 24, 1948, the plaintiff duly served a notice to quit the cottage expiring on September 6, 1948, on Christine Hopkins, who had continued to live at the cottage after her father's death. Subsequently in the county court he claimed recovery of possession of the cottage from Christine Hopkins, the defendant, suing her both in her own capacity and in her capacity as administrator of her father's estate.

At the hearing there was no evidence that any of the children of Bland, other than the defendant, had made any claim to the possession of the cottage. The plaintiff contended (a) that, since Bland was always a contractual tenant and never became a statutory tenant, the defendant could not claim protection under s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, *Thynne* v. *Salmon* (1) ; and (b) that the defendant was merely administratrix and representative of all persons entitled to Bland's estate, and therefore she was not a " tenant " within the meaning of s. 12, sub-s. 1 (*f*) of the Act of 1920, wherein the expression " tenant " includes any person from time to time deriving title under the original tenant. The defendant contended that she became contractual tenant of the cottage by the express terms of s. 12, sub-s. 1 (*f*), when she took out the letters of administration on July 7, 1948, and that therefore she became a statutory tenant of the premises when the notice to quit expired on September 6, 1948.

His Honour judge St. John Field, made an order for possession, holding that the case came within the principle stated in *Smith* v. *Mather* (2).

The defendant appealed.

Mrs. Y. Frazer for the defendant. The county court judge was in error in making an order for the recovery of possession of this cottage. The decision in *Smith* v. *Mather* (2), on which the judge decided the case, is irrelevant to the issue, since in that case no letters of administration were taken out and the issue there arose under s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act,

(1) [1948] 1 K. B. 482.

(2) [1948] 2 K. B. 212.

1920. Here, the defendant had taken out letters of administration in respect of her late father's estate, that is of the estate of the contractual tenant of this cottage. Further, the defendant was in occupation of the cottage, at the time when the notice to quit, served on her, expired. These being the facts, the defendant was then the contractual tenant of the cottage since, by s. 12, sub-s. 1 (*f*) of the Act of 1920 the expression " tenant " includes any person from time to time deriving title under the original tenant—in this case the defendant's father. The defendant, being the contractual tenant of the cottage when the notice to quit expired, became a statutory tenant, protected by the Rent Restriction Acts, and no order for recovery of possession by the landlord should have been made against her. There is no direct authority on this question, but Scrutton L.J., supported this view in *Skinner* v. *Geary* (1), and Morton L.J., said in *Lawrance* v. *Hartwell* (2) : " In my view, an executrix who is living in the " house at the time of the testatrix's death, who is living in " the house at the time the notice to quit expires, and who " has not up to that time taken any step to divest herself of " the interest in the property, does become a statutory tenant." That is this case.

Stabb for the plaintiff landlord. The decision of the county court judge was right, though the reason he gave for his decision, the authority of *Smith* v. *Mather* (3) cannot be supported. The construction given to the word " landlord " in *Sharpe* v. *Nicholls* (4) and in *Parker* v. *Rosenberg* (5) shows that the word " tenant " cannot be construed to include the defendant in this case. In the former case, it was held that personal representatives were not " landlords " within the meaning of para. (*h*) of sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 and, in the latter, trustees were precluded, as landlords, from recovering possession under para. (*h*), since they had no beneficial interest in the dwelling-house. In this case, the defendant only shared the beneficial interest in the tenancy with the five other children of the deceased tenant, their father. The sole question, therefore, is whether the defendant as personal representative—a mere means of passing the beneficial interest in property—can be held to be a " tenant " of the property

(1) [1931] 2 K. B. 546.
(2) [1946] K. B. 553, 558.
(3) [1948] 2 K. B. 212.
(4) [1945] K. B. 382.
(5) [1947] K. B. 371.

and to have derived her title from her father. An executor as administrator, though in occupation of the dwelling-house when the notice to quit expires is not a "tenant" of the house, if he has no beneficial interest in the tenancy or if, though he has a beneficial interest in the tenancy, it is not exclusive. The personal representative is a mere conduit pipe to transmit the title to the beneficial owner. It cannot be suggested that a personal representative or trustee is granted by the Rent Restriction Acts rights, which cannot be exercised in their own personal interest. A statutory tenant acquires a kind of status of irremovability which is personal and cannot be transferred by him to another. But the raison d'être of a personal representative, as regards any particular item of property in the estate is the ability to transfer it to the proper beneficial owner. Moreover, if the contention of the defendant be correct, a personal representative is a trustee who in these conditions must necessarily make a profit out of his trust, which is absurd. The object of the Rent Restriction Acts is to protect a citizen in his home and the person protected is that citizen in beneficial possession. The possession of a personal representative is, ex necessitate rei, purely transitory. The only provision in the Acts to protect possession after the death of a tenant is s. 12, sub-s. 1 (*g*) of the Act of 1920. But that does not apply here, since the deceased tenant was at the time of his death a contractual and not a statutory tenant. *Thynne* v. *Salmon* (1) and *Smith* v. *Mather* (2). It is contrary to the whole meaning and policy of the Rent Restriction Acts that the tenancy of a mere trustee should be protected.

Mrs. Y. Frazer in reply. The cases of *Sharpe* v. *Nicholls* (3) and *Parker* v. *Rosenberg* (4) are not in point, since the court was there considering the position of a landlord under para. (*h*) of sch. I to the Act of 1933, where the balance of hardship is in issue. If the landlord were a mere personal representative, there could be no question of the balance of hardship. The personal representative of a deceased tenant is a "tenant," since he derives title under the original tenant within the meaning of s. 12, sub-s. 1 (*f*) of the Act of 1920. See *Collis* v. *Flower* (5) and the observations on that decision of Scrutton L.J. in *Skinner* v. *Geary* (6). The defendant here

(1) [1948] 1 K. B. 482.
(2) [1948] 2 K. B. 212.
(3) [1945] K. B. 382.
(4) [1947] K. B. 371.
(5) [1921] 1 K. B. 409.
(6) [1931] 2 K. B. 546, 562–3.

relies on the reasoning of Morton L.J. in *Lawrance* v. *Hartwell* (1).

McIntyre v. *Hardcastle* (2) and *Mackley* v. *Nutting* (3) were also mentioned.]

Cur. adv. vult.

July 28. BUCKNILL L.J. With all respect to the county court judge, I do not think that the decision in *Smith* v. *Mather* (4) concludes this case. The facts in that case differed fundamentally from those in this, because in *Mather's* case (4) no letters of administration were taken out. The decision of the Court of Appeal proceeded on the basis that by s. 9 of the Administration of Estates Act, 1925, the tenancy vested in the President; that it was inconsistent with such vesting in the President that there should also be a statutory tenancy in the children of the deceased tenant, and that the notice to quit served on the President was a valid notice to bring the contractual tenancy to an end. The crucial point in this case is whether the defendant, when she received a grant of administration of the deceased tenant's estate, became a tenant within the meaning of s. 12, sub-s. 1 (*f*) of the Act of 1920. Observations by Morton L.J., as he then was, in *Lawrance* v. *Hartwell* (1), support this view. In that case the plaintiff let a dwelling-house to X. Subsequently, the defendant also went to live in the house, and X. made a will appointing the defendant sole executrix and sole beneficiary. Then X. died, and probate of her will was granted to the defendant. Subsequently, the plaintiff gave the necessary notice to quit to the defendant and then started an action for possession. The defendant claimed the protection of the Rent Restriction Acts, and the question for decision was whether she was a "tenant" entitled to protection. The county court judge gave judgment for the defendant. On appeal, the plaintiff argued that the defendant took possession purely in a representative capacity, and as such was incapable of residing on the deceased's property as a home. Morton L.J., in the course of his judgment pointed out that the whole legal and beneficial interest in the tenancy was vested in the defendant, and then went on to say (5): "I propose to assume for the "moment that the defendant had no beneficial interest at all

(1) [1946] K. B. 553.
(2) [1948] 2 K. B. 82.
(3) [1949] 2 K. B. 55.
(4) [1948] 2 K. B. 212.
(5) [1946] K. B. 553.

C. A.

1949

HARRISON
v.
HOPKINS.

Bucknill L.J.

"in the testatrix's estate. In these circumstances would the "defendant be protected by the Acts? On the assumption "that I have made, the defendant would still be a person "deriving title under the original tenant, and in fact the "defendant would still be in possession, although there would "be this difference in the situation that sooner or later a beneficiary might come along and say: 'that house was devised "'to me, and I desire to reside in it. Please assent to my "'taking over, and leave the house.' But in the meantime, "the position is that the defendant is in the house. In my "view, an executrix who is living in the house at the time "of the testatrix's death, who is living in the house at the time "the notice to quit expires and who has not up to that time "taken any step to divest herself of the interest in the property, "does become a statutory tenant." These remarks, although obiter, seem in principle to fit the present case. Indeed, in as much as the defendant is a part beneficiary as well as administrator, her position is stronger than in the illustration given by Morton L.J., where the defendant had no beneficial interest in the tenancy.

On the other hand, the plaintiff landlord in this case relied on *Sharpe* v. *Nicholls* (1). In that case the plaintiff's husband owned a cottage which he had let to the defendant. On the death of her husband the plaintiff desired the cottage for her own occupation, and she therefore started proceedings claiming possession of the premises which were required for her own occupation, and claiming, with her nephew, as personal representatives of the deceased landlord. At the hearing, the case was argued solely on the question of hardship, and the county court judge ordered the defendant to give the plaintiff possession. On appeal the defendant argued that the plaintiffs claimed only as personal representatives of the landlord, and that there was no evidence that the widow was beneficially entitled to the premises. As the point was not taken before the judge and the order was bad in other respects, a majority of the court ordered the case to be retried, but Morton L.J. considered that judgment should be given for the defendant on the ground that the plaintiffs had not proved the necessary facts to bring them within para. (*h*) of sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which provides in effect that the court shall have power to make an order for the recovery of possession, if the dwelling-

(1) [1945] K. B. 382.

house is reasonably required by the landlord for occupation as a residence for himself or his children or parents. Morton L.J., said that the whole case was that the plaintiffs were the owners as personal representatives, and there was no evidence that the widow had any beneficial interest in the house, and that, in his opinion, the expression " landlord " in para. (*h*) of sch. I to the Act of 1933 did not apply to one of several legal personal representatives. So also in *McIntyre* v. *Hardcastle* (1), the plaintiffs were sisters and had joint legal and beneficial ownership of a house within the Rent Restriction Acts. They brought an action for possession against the tenant on the ground that the house was required for occupation as a residence by one of them. The county court judge dismissed the action on the ground that para. (*h*) of sch. I to the Act of 1933 did not apply, where only one of the landlords claimed the house for his own occupation, and this decision was upheld on appeal.

In the present case counsel for the plaintiff landlord argued that the administratrix only shared the beneficial interest in the premises with the five other children of the deceased tenant, and could not be said to have such a beneficial interest in the property as would entitle her to claim to be a person deriving title under the original tenant. He pointed out the hardship on the landlord it a personal representative could claim the house as a residence for himself, although he had no beneficial interest in the property, providing he was residing there when the notice to quit expired. The only effective solution that I can see to this difficult problem is on the basis that the decision must depend on its particular facts, and on the actual words of the appropriate section of the Act, and that it is not practicable to make the decision accord with its possible results in every hypothetical case with quite different facts. In this case there was no evidence that any of the other children made any claim to the cottage or had ever lived there. As Tucker L.J. said in *McIntyre* v. *Hardcastle* (2) : " All kinds of difficulties have been suggested to us as " likely to follow whichever interpretation is accepted by us. " I do not think that the legislature really contemplated this " situation when this paragraph was framed. Therefore, " I feel driven to interpret it in the light of the language used."

Applying this test, it seems to me that in this case the defendant, as administratrix, derived title under the original tenant, and being in occupation of the house at the material time she is entitled to the protection of the Rent Restriction Acts.

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(1) [1948] 2 K. B. 82.

(2) Ibid. 90.

I think, therefore, that this appeal should be allowed.

COHEN L.J. I am of the same opinion. The question turns on the meaning of the word " tenant " in s. 12, sub-s. 1 (*f*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides that the expression " tenant " includes any person from time to time deriving title under the original tenant. There is nothing in the context to require the attribution of a secondary meaning to these words. In their natural signification persons claiming title by devolution are as much within the definition as persons claiming title by assignment. If, therefore, the sub-section is construed according to the natural sense of the word used, the defendant in this case is a tenant within the sub-section. It is not disputed that she was in occupation at the material date, namely, the date of expiration of the notice to quit and, says Mrs. Frazer, she is, therefore, plainly a statutory tenant. This was the argument Mrs. Frazer addressed to the county court judge and she supported it by a reference to *Lawrance* v. *Hartwell* (1). In that case this court upheld the claim of the tenant on the ground that as the entire interest in the tenancy had vested in the defendant as executrix and beneficiary, before the expiration of the notice to quit, she was a person deriving title under the original tenant within the meaning of s. 12, sub-s. 1 (*f*) of the Act of 1920 and, since she was personally residing in the dwelling-house was entitled to remain as statutory tenant. But Morton L.J., who gave the leading judgment, with which the other members of the court agreed, went on to consider what the position would have been had the defendant had no beneficial interest in the estate of the testatrix. He held that, even on this basis, the defendant would have been entitled to remain in possession saying (2): " On the assumption that I have made, the defendant would " still be a person deriving title under the original tenant, " and in fact the defendant would still be in possession, although " there would be this difference in the situation, that sooner " or later a beneficiary might come along and say:- ' that " ' house was devised to me and I desire to reside in it. Please " ' assent to my taking over, and leave the house.' But, in " the meantime, the position is that the defendant is in the

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(1) [1946] K. B. 553. (2) Ibid. 558.

"house. In my view, an executrix who is living in the house "at the time of the testatrix's death, who is living in the "house at the time the notice to quit expires, and who has "not up to that time taken any step to divest herself of the "interest in the property, does become a statutory tenant."

Now this view, if correct, plainly covers the present case, but the county court judge rejected Mrs. Frazer's argument, saying that the case in his view was concluded in favour of the landlord by the decision of this court in *Smith* v. *Mather* (1). That case, however, turned on paragraph (*g*) of s. 12, sub-s. 1, and the point we have to decide did not arise. Mr. Stabb did not seek to support the county court judge's ratio decidendi, but he presented a much more formidable argument in support of the landlord. He relied particularly on two decisions of this court, the first in *Sharpe* v. *Nicholls* (2), and the second, *Parker* v. *Rosenberg* (3), in both of which this court had to consider the rights of a landlord to possession. The question in each case, however, arose not under s. 12, sub-s. 1 (*f*) of the Act of 1920, but under s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and para. (*h*) of sch. I thereto. In the first case proceedings were commenced by the widow and nephew of the deceased landlord as personal representatives to recover possession of premises within the Rent Restriction Acts for the occupation of the widow. There was no evidence to prove that the widow had any beneficial interest in the estate of the deceased landlord. The actual decision in the case did not turn on whether personal representatives were landlords within the meaning of para. (*h*), but Morton L.J., expressed an opinion on the point (4), saying: "The plaintiffs' whole case, as I have shown from their pleadings, is based upon the allegation that they were the "owners as personal representatives. I cannot find any "admission at the trial in any shape or form that the widow "had any beneficial interest in the house. I do not know, "in the least who was entitled to the house. For all I know "Mr. Sharpe may have made a will leaving it to a nephew "or to any other person. In those circumstances, one must "consider whether it can be said that the 'dwelling-house "'is reasonably required by the landlord for occupation as "'a residence for himself or herself,' when the plaintiffs are "legal personal representatives suing in that capacity and

(1) [1948] 2 K. B. 212.
(2) [1945] K. B. 382.
(3) [1947] K. B. 371.
(4) [1945] K. B. 382, 389.

"one of them wants to live in the house. In my opinion, "such a case is not within the terms of para. (*h*) of sch. I at all. "Strange results would follow if that were not so. For "instance, you might have four legal personal representatives, "none of whom was related to the testator at all, and one "of them might require the house as a residence for himself "or herself, having no beneficial interest whatsoever in the "property. I am clearly of opinion that such a case could "not possibly be within the terms of para. (*h*). It is also to "be observed that the words 'himself or any son or daughter "'of his . . . . or his father or mother' seem to refer to "a person who is the landlord not in the sense that he or she "is one of several personal representatives, but in the sense "that he or she is the sole owner of the property subject to the "tenancy. It seems to me, therefore, that the plaintiffs "entirely failed to prove that they came within para. (*h*), "and that if they failed to prove that they came within "para. (*h*) the words of s. 3 of the Act absolutely precluded "the county court judge, and would preclude this court, "from making any order for the recovery of possession."

These observations were obiter; but in the second case, that of *Parker* v. *Rosenberg* (1), they were approved and applied to a case where legal personal representatives were seeking to recover possession of premises for the occupation of a sister of the testatrix who was the tenant for life under her will. Tucker L.J. said (2): "It is clear that neither the definition "section of the Act of 1920 nor para. (*h*) of sch. 1 to the Act of "1933 confer on anyone any right to an order for possession "which he does not otherwise possess. Para. (*h*) is designed "to relax in certain cases the previously imposed statutory "restrictions on the right of recovery. In the present case "Miss Marsh, apart from the Rent Restrictions Acts, would "not have been entitled to sue in ejectment. She was not "a party to the lease and was not entitled to the reversion. "There is nothing in para. (*h*) of sch. I to the Act of 1933, "enabling her to sue or be added as a plaintiff. As the proper "plaintiffs, the trustees, cannot bring themselves within "para. (*h*) and Miss Marsh cannot herself sue, it follows that "no order for possession could properly be made in the present "case."

Those decisions lend some colour to Mr. Stabb's argument, but I would observe that the question in each case before the

(1) [1947] K. B. 371. (2) Ibid. 376.

C. A.
1949
HARRISON
v.
HOPKINS.
Cohen L.J.

court was not as to the meaning of the expression " landlord " in the abstract, but as to the right of the landlord to possession under para. (*h*) of sch. I to the Act of 1933, and the landlord had therefore to prove not only that he was a landlord but also that he required the premises for his own occupation, and that greater hardship would be involved in refusing him possession than in depriving the tenant of possession, a burden which plainly an executor or administrator without a beneficial interest in the property would be unable to discharge. These considerations are not expressly mentioned in the judgments in the cases cited, but they afford a means of reconciling them with the earlier opinion expressed by Morton L.J. in *Lawrance* v. *Hartwell* (1), an opinion with which I find myself in complete agreement. Mr. Stabb also referred us to a decision of this court in *McIntyre* v. *Hardcastle* (2), where two joint legal and beneficial owners sought to recover possession under para. (*h*) of sch. I to the Act of 1935, in order that one of them might occupy the premises. Their claim was rejected, it being pointed out that when the paragraph was re-written with the aid of the Interpretation Act, 1889, so as to apply to the case of two executors, the plaintiffs were unable to fulfil the conditions of para. (*h*). This case does not, I think, assist the decision of the case before us. For these reasons I would allow the appeal.

ASQUITH L.J. The question for decision in this case is whether on the expiry of the notice to quit served on the defendant, the defendant became a statutory tenant If she did, it is now common ground that she has done nothing to forfeit the " status of irremovability " inherent in statutory tenancy. She was a statutory tenant from the moment the notice to quit expired, if, and only if, she was then a " tenant " of a dwelling-house to which the Acts apply. The dwelling-house was certainly as regards rateable value a dwelling-house to which the Acts apply: for although only its rent appears in the evidence, every dwelling-house is presumed to be such in respect of the rateable value until the contrary is shown (see s. 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938). Was she then a " tenant " of that dwelling-house? This question remits us to the definition of " tenant " for the purpose of the Acts. Section 12, sub-s. 1 (*f*) of the Act of 1920 defines " tenant " as including anyone

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(1) [1946] K. B. 543.
(2) [1948] 2 K. B. 82.

"deriving title under the original tenant." At the first blush, it would appear obvious that the defendant in this case complies with that description. On Mr. Bland's death intestate, his tenancy vested under s. 9 of the Administration of Estates Act, 1925, in the President of the Probate, Divorce and Admiralty Division of the High Court until administration was granted; and when administration was granted in the administratrix, namely, the defendant. She therefore derived title through the President as intermediary, under "the original "tenant," Mr. Bland. To be a tenant within the definition, it is true, that she has also to be in occupation at the time the notice to quit expires. But then the defendant more than fulfils this condition. She had resided in the dwelling-house for several years before her father died, and is residing there today.

But it is argued that an administrator though resident is not a tenant (*a*) if he has no beneficial interest in the tenancy, or alternatively (*b*) if, though he has a beneficial interest, it is not exclusive: if, that is, there are other beneficiaries sharing that interest with him. I proceed to consider the first of these propositions, since, if its contrary is established, the second proposition does not arise, and the case is concluded in favour of the defendant. It is said that where the original tenant is dead, the personal representative or personal representatives are a mere conduit pipe for "transmitting the title to the beneficiaries"; and that it cannot have been intended that they should gain substantive rights exercisable in their own personal interest—such as the status of irremovability conferred by a protected tenancy. Such a status is notoriously non-transferable and is inappropriate to a bare personal representative whose raison d'être is to transfer property or rights to others. Further, it is contended, that, on the alternative view, a personal representative who is a trustee would necessarily, in circumstances such as those of the present case, make a profit out of his trust. Again, the object of the Act is, it is said, to keep a roof over the head of a person made of flesh and blood and beneficially entitled, not of a person whose occupation is inherently transitory and who is a mere mechanism for handing that occupation over. Then, again, it is argued that the only provision in the Acts designed to protect possession after death is s. 12, sub-s. 1 (*g*) of the Act of 1920, which admittedly does not apply to protect the defendant's possession in this case, since it only applies where the deceased was a statutory, not a common law, tenant; *Thynne* v. *Salmon* (1), and *Smith* v. *Mather* (2). These and similar arguments were advanced by Mr. Stabb, with a force and address to which this bald summary does less than justice.

In considering them, we should take as our starting point the proposition that in construing a statute, the words used are primarily to be read in their ordinary grammatical meaning: or if the words used amount to a term of art, in their established technical meaning. The words "deriving title under "the original tenant," seem inevitably to include the defendant, whether regarded as plain English or as a formula used in a technical sense by conveyancers. But the matter, of course, doesn't rest there: for the meaning of words, as ascertained by the foregoing tests, may have to be modified by reference to the context, to the mischief struck at by the statute, and to decided cases construing it. As regards case law, there is no authority precisely in point, though several cases are indirectly relevant, through dicta or implication. More than one of these are decisions on the meaning not of the expression "tenant," but of that of "landlord" (a term which is also defined in s. 12, sub-s. 1 (*f*) of the Act of 1920). These decisions construe "landlord" mainly in respect of its meaning for the purposes of para. (*h*) of sch. I to the Act of 1933. Thus in *Sharpe* v. *Nicholls* (3), it was held by the Court of Appeal that, where two personal representatives sought to avail themselves of para. (*h*), on the ground that one of them required the premises for residence for himself, they were not a "landlord," within the meaning of s. 12, sub-s. 1 (*h*) of the Act of 1920, and that therefore they failed. On the pleadings it was quite clear that the plaintiffs sued in their representative capacity. It does not appear whether both or either had any beneficial interest, since it does not even appear whether there was a will or not, or whether the personal representatives sued as executors or administrators. *Parker* v. *Rosenberg* (4) decided the same again as regards the meaning of "landlord" in para. (*h*) of the schedule in relation to a claim by trustees appointed under a will, who had no beneficial interest. They were the proper plaintiffs, but could not succeed. A beneficiary who was added as co-plaintiff was held to be improperly so added.

Lawrance v. *Hartwell* (5) is a decision on the meaning not of the expression "landlord," but of that of "tenant" and therefore, nearer to this case. The deceased tenant left a will and the defendant who was in residence on the premises at the time of the decease and thereafter, was sole executrix and sole beneficiary under the will. She was held to be a "tenant" within the meaning of s. 12, sub-s. 1 (*f*) of the Act of 1920, qua person "deriving title under the original tenant." The question whether the position would have been the same, if she had had no beneficial interest, though at the highest collateral to the point actually decided, was extensively canvassed and occupies half—or perhaps more than half—of the leading judgment of Morton L.J., with which the other two members of the court merely concurred. His answer to this question is a plain "Yes." This appears sufficiently from such passages as the following (1): "I propose to assume "for the moment that the defendant had no beneficial interest "at all in the testatrix's estate. In those circumstances, "would the defendant be protected by the Acts? On the "assumption that I have made, the defendant would still "be a person deriving title under the original tenant, and in "fact the defendant would still be in possession, although "there would be this difference in the situation that sooner "or later a beneficiary might come along and say: 'that "'house was devised to me, and I desire to reside in it. Please "'assent to my taking over, and leave the house.'"

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(1) [1948] 1 K. B. 482.
(2) [1948] 2 K. B. 212.
(3) [1945] K. B. 382.
(4) [1947] K. B. 371.
(5) [1946] K. B. 553.

Lord Morton (as he has since become) pointed out that in *Skinner* v. *Geary* (2), Scrutton L.J., commenting on the case of *Collis* v. *Flower* (3) makes it clear that he held the same view. In conclusion, Lord Morton makes an observation (4) which, even if the passages I have cited from his judgment and those he has cited from Scrutton L.J. are purely obiter, is in itself irrefragable: "The position," he says, "is that there is no authority for the proposition that an "executor who has proved the will, who has not assented to "a bequest to someone else, and who is in actual possession "of the house at the termination of the common law tenancy, "is not entitled to the protection of the Acts."

In my view, if this is true of executors, it is equally true of administrators. This expression of opinion may be obiter, but proceeded from a judge with great experience in construing these Acts, and I cannot see any adequate reason why it should

(1) [1946] K. B. 553.
(2) [1931] 2 K. B. 546.
(3) [1921] 1 K. B. 409.
(4) [1946] K. B. 553, 560.

C. A.
1949
HARRISON v. HOPKINS.
Asquith L.J.

not be adopted. It accords not only with the views of Scrutton L.J., but with the literal and the technical meaning of the words used. I am, for myself, not impressed by the argument founded on the construction given in certain cases to the word "landlord." I do not think the meaning of the word "tenant" can be deduced simply mutatis mutandis, from that of the word "landlord." The definitions of the two terms in s. 12, sub-s. 1 of the Act of 1920 are not such that the definition of the one case is an infallible guide to that of the other by conversion, reciprocity, or any other logical automatic device, as a perusal of s. 12, sub-s. 1 (*g*) will show.

Apart from this, several of the cases I have in mind and have cited, deal with the meaning of the expression "landlord," not solely in regard to its definition in s. 12, sub-s. 1 (*f*), but specifically in regard to its meaning in the particular context of para. (*h*) of sch. I. to the Act of 1933. The language employed in para. (*h*) is, it seems to me, entirely inappropriate when a landlord who is a personal representative is involved. Where a personal representative is involved, then, as was pointed out during the argument by my brother Cohen, the question of the comparative hardship to the tenant of granting, and to the landlord of refusing an order for possession, seems wholly artificial: and I think these cases, founded on the meaning of the expression "landlord" and of its meaning in a particular connexion, shed no light on the meaning of the expression "tenant" in this case. *Smith* v. *Mather* (1) on the authority of which the county court judge decided against the defendant, seems to me of no direct relevance to this case, because it was concerned with the question whether a relation of the deceased was entitled to stay on by virtue of s. 12, sub-s. 1 (*g*) of the Act of 1920, and in this case no one contends that the defendant is entitled to stay on by virtue of that provision, which only applies where the deceased tenant was a statutory and not as in the present case, a contractual tenant. *Thynne* v. *Salmon* (2) is, for the same reason, irrelevant. So, also, is, as the county court judge rightly observed, *Mackley* v. *Nutting* (3) a case which the judge says was "brought to his notice." It was not cited before him by any counsel in the case. The judge states that though bound by, he does not understand this decision. Since we agree with him that the decision is irrelevant, it is unnecessary to discuss its meaning.

(1) [1948] 2 K. B. 212.
(2) [1948] 1 K. B. 482.
(3) [1949] 2 K. B. 55.

C. A.
1949
HARRISON
v.
HOPKINS.
Asquith L.J.

The argument that, on the construction which I favour the personal representatives, quoad trustees, would be bound to make a profit out of their trust does not strike me as at all decisive. If he did, the cestui que trust could no doubt cause him to account for the cash value of any such profit. For the purposes of s. 12, sub-s. 1 (*f*), I do not think the landlords could look beyond the "curtain" of trustees. I adhere to the dicta of Morton L.J. in *Lawrance* v. *Hartwell* (1) (a decision to which I was a party) and of Scrutton L.J., in *Skinner* v. *Geary* (2). I am of opinion that the administrator-defendant was a protected tenant, that the order for possession was wrong, and that the appeal should be allowed.

Appeal allowed.

Solicitors for the defendant: *Bennett, Ferris & Bennett, for Bray & Bray, Leicester.*

Solicitors for the plaintiff: *Shelton, Cobb & Co., for Woodrow & Aysom, Leicester.*

(1) [1946] K. B. 553. (2) [1931] 2 K. B. 546.

Discussed. GRAHAM AND SCOTT (SOUTHGATE), LTD. v. OXLADE. [1950] 1 All E.R. 856.

Distinguished. DENNIS REED, LTD. v. GOODY. [1950] 1 All E.R. 919.

Explained. GRAHAM & SCOTT v. OXLADE [1950] 2 K. B. 257

E. P. NELSON & Co. v. ROLFE.

C. A.
1949
July 27.
Bucknill, Cohen and Asquith L.JJ.

Principal and agent—Commission—Sale of bungalow—Estate agents' commission—If they introduce to principal a person able, ready and willing to purchase the property on terms specified—Person so introduced by agent—Offer refused, because of an arrangement made with another would-be purchaser, not binding in law, but morally and as a matter of business—Agent's commission payable.

The defendant, the owner of a bungalow, instructed the plaintiffs to offer the bungalow for sale, on the terms that if the plaintiffs introduced "a person, able, ready and willing to purchase" the bungalow on the principal's terms, they would be entitled to commission. On the next day, in the morning, E. was introduced to the defendant by other agents instructed by the defendant to offer the bungalow for sale. E. paid a small deposit and was granted an option, to continue for twenty-four hours, to purchase the bungalow at a price to be fixed. In the afternoon P., a person able, ready and willing to purchase the bungalow on the defendant's terms, was introduced to him by the plaintiffs. The defendant refused to sell the bungalow to P. saying that a deposit had been paid by another and an option granted to him

C. A.

1949

E. P. NELSON & Co. *v.* ROLFE.

to purchase it. The bungalow was subsequently sold by the defendant to E. In an action by the plaintiffs claiming commission for the introduction of P. to the defendant within the terms of their contract, the county court judge said that the bungalow having been taken off the market by the defendant, before the introduction of P., under an arrangement with E., not binding in law, but, in his view, binding morally and as a matter of business, no commission was payable and the defendant was entitled to judgment. On appeal, it was contended that this contract was subject to two implied terms: (1.) that commission was payable only in respect of the first introduction by any agent; and (2.) that if the principal should take the property offered for sale off the market (without informing his agent or agents), "justifiably," in the sense that he felt bound to do so morally, or to comply with good business standards, (e.g. because of an arrangement with a prospective purchaser, although the property had not been sold to him), no commission should be payable in respect of a subsequent introduction by the agent, under the contract.

Held, that the contract between the plaintiffs and the defendant was not subject to either of the suggested implied terms, since neither was necessary, in the business sense, to give efficacy to the contract. The plaintiffs were entitled to their commission.

APPEAL from Willesden county court.

The defendant, M. E. Rolfe, was minded to sell a bungalow, 93, Barnhill Road, Wembley Park, being in treaty to buy a house elsewhere. The defendant gave instructions to several agents and amongst them the plaintiffs. The defendant's wife, on his behalf, signed a document on October 4, 1948, which, after giving the address of the bungalow to be sold and the price 2,500*l*., continued: "I hereby instruct Messrs. E. P. Nelson & Co. to offer for "sale the property . . . . on the understanding that in "the event of Messrs. E. P. Nelson & Co. introducing to "me a person able, ready and willing to purchase the "property on the terms indicated above, or on terms "subsequently authorized by me, I will pay them, "immediately upon such introduction, commission in "accordance with" certain terms and conditions.

A Mr. Emile first saw the house on the morning of October 5, 1948, being sent by Cowdrey & Co., other estate agents, instructed by the defendant to offer the bungalow for sale. He returned to these agents at 10 a.m. and informed them that he had not got the full 10 per cent. deposit but he paid a preliminary deposit of 5*l*., which was accepted. Cowdrey & Co. then at about 10.30 a.m. got into communication with the defendant's wife, who told them that there were certain repairs required to the house which the defendant was going to purchase and that to pay for these the defendant would require a higher price for the bungalow. Cowdrey & Co., then on behalf of Mr. Emile asked for an option for 24 hours on the bungalow at a higher price to be fixed. The defendant gave Mr. Emile this option.

A Mrs. Payne, sent by the plaintiffs, was the next visitor to the bungalow. She said that she would like her husband to see it, but he could not see it until the next day and she asked the defendant's wife to keep the bungalow for them. The defendant's wife (the defendant not being at the bungalow) replied that she was sorry that she could not do that: it might be sold before.

The defendant returned to the bungalow at 12.30 p.m. and told his wife that it would cost at least 250*l.* in repairs to make habitable the house he proposed to purchase. In the afternoon, as the judge found, Mr. Payne and his wife arrived at the bungalow. Mr. Payne, it was admitted, was then able, ready and willing to purchase the bungalow, on the principal's terms, but the defendant's wife said that she was very sorry, but the bungalow was sold. She had given an option on it and there had been a deposit paid. Mr. and Mrs. Payne then left the bungalow. The bungalow was sold to Mr. Emile for 2,700*l.*

The plaintiffs claimed from the defendant in the Willesden county court commission on the contract of October 4, 1948, on the ground that on the afternoon of October 5, 1948, they had introduced to the defendant a person able, ready and willing to purchase the bungalow—Mr. Payne—on the defendant's terms. His Honour Judge Neal said that the plaintiffs could not obtain their commission, if the property had already been sold, before the introduction of the able, ready and willing purchaser. To this proposition counsel for the plaintiffs agreed. His Honour then said that the plaintiffs could not claim their commission, if the property had been taken off the market, not legally, but in a business sense. The defendant had withdrawn the property by reason of an arrangement with Mr. Emile, not binding in law, but in the court's view binding morally and as a matter of business. It would be a different question if the vendor had "improperly, "or arbitrarily or whimsically withdrawn the bungalow "from the market"; but that was not so in this case. On this ground, he gave judgment for the defendant, the principal. The agents appealed.

Geoffrey Howard for the plaintiffs, the agents : The contract here was that the principal instructed the agents to offer for sale the bungalow on the understanding that if the agents introduced to him a person, able, ready and willing to purchase the property on the terms set out in the contract or on terms subsequently authorized by the principal, commission would be payable. There are three, and only three implied terms to be read into this contract : commission is not payable, if, before the introduction (1.) the authority to the agent is withdrawn ; (2.) if the property has already been sold ; or (3.) if the principal has entered into a binding contract to sell to another. The county court judge has added another implied term, that commission is not payable on such an introduction if, before the introduction, negotiations between the principal and a person considering the purchase of the property are so far advanced, that a deposit has been paid on the grant of an option to the proposed purchaser, although that option has not been exercised. Although the principal at the time of the introduction is not bound in law to sell to the proposed purchaser, yet if he feels bound morally or as a matter of proper business to sell to that proposed purchaser, the introduction by the agents of another person able, ready and willing to purchase the property, does not give them the right to obtain commission under this contract.

It is submitted that this proposition is wrong as appears from *Luxor* (*Eastbourne*) *Ld.* v. *Cooper* (1). " Implied terms, " as we all know, can only be justified under the compulsion " of some necessity." See the speech of Lord Russell of Killowen in *Luxor's* case (2). A term can only be implied if it is necessary in the business sense to give efficacy to the contract. (Lord Wright in the *Luxor* case (3).)

The contract here was fulfilled : the person able, ready and willing to purchase the bungalow had been introduced at a time when the defendant, the principal, had not sold or agreed to sell the bungalow and when his authority to the plaintiffs, his agents, had not been withdrawn. The plaintiffs, therefore, are entitled to their commission. The vendor of a house may well have to pay two commissions : that

(1) [1941] A. C. 108.
(2) Ibid. 125.
(3) Ibid. 144.

depends on his contract with the two agents. Where two firms of auctioneers claim commission in respect of the same sale of the same house, the defendant is not entitled to relief by way of interpleader, since the two claims by the auctioneers differ: *Greatorex* v. *Shackle* (1). See also *Keppel* v. *Wheeler and Another* (2). There is no reason in law why a contract should not provide for commission to be payable by a principal on the agents introducing a " person "—not a purchaser—able, ready and willing to buy. Viscount Simon L.C. in *Luxor (Eastbourne) Ld.* v. *Cooper* said (3): "There is the class in which the " agent is promised a commission by his principal if he succeeds " in introducing to his principal a person who makes an " adequate offer, usually an offer of not less than the stipulated " amount. If that is all that is needed in order to earn his " reward, it is obvious that he is entitled to be paid when " this has been done, whether his principal accepts the offer " and carries through the bargain or not." As Lord Russell of Killowen said in the *Luxor* case (4): " It is possible that " an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to " purchase at the specified or minimum price; but such " a construction of the contract would, in my opinion require " clear and unequivocal language." Here the language of the contract was clear and unequivocal. See also *Dennis Reed Ld.* v. *Nicholls* (5) and *Bennett & Partners* v. *Millett* (6).

G. R. F. Morris for the defendant, the principal. Two implied terms must, of necessity, be implied under this contract. The first is that commission is only payable on the first introduction by any agent of a person, able, ready and willing to purchase, since the introduction will only be effective, if there is a property which can still be purchased.

[Cohen L.J. You will have to define what is meant by " a property which can still be purchased."]

The county court judge found that the plaintiffs knew that the bungalow was being offered for sale by other agents, and the plaintiffs and the other agents were entitled to pursue and and practise their profession in accordance with the ordinary standards of their profession, which would be such as to avoid confusion: the person first introduced by an agent who was able, ready and willing to buy would earn commission for that agent. Mr. Emile was the first such person introduced and the agents who introduced him to the defendant, Messrs. Cowdrey & Co., only are entitled to commission. The time factor must be vital on the issue as to what agent has earned commission: it is required to give this contract business efficacy. The implied term was that the first introduction should be the one to earn commission—a term by which the parties intended to be bound and on which they acted. See *Central London Property Trust Ld.* v. *High Trees House Ld.* (1). If a man gives a promise or assurance, which he intends to be binding on him and to be acted on by the person to whom it is given, then once it is acted upon, he is bound by it. See the judgment of Denning J., in *Robertson* v. *Minister of Pensions* (2).

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(1) [1895] 2 Q. B. 249.
(2) [1927] 1 K. B. 577.
(3) [1941] A. C. 108, 120.
(4) Ibid. 129.
(5) [1948] 2 All E. R. 914.
(6) [1949] 1 K. B. 362.

There is another implied term in this contract, viz., that if the principal has justifiably—not, in the words of the county court judge, "improperly, arbitrarily or whimsically,"—withdrawn the property from the market, commission is not thereafter payable. The county court judge has found as a fact that this bungalow was withdrawn from the market and there was evidence on which he was entitled so to find. That took place when the principal and Mr. Emile had entered into an arrangement, by the payment of the deposit and the grant of the option—an arrangement which they intended to be binding on them, although, as is admitted, this arrangement was not enforceable by either of them at law. The judge approached the problem by seeking to give business efficacy to the contract. The principal was entitled, in law, to take the bungalow off the market and that having been done there was no "ability" on the part of Mr. Payne to purchase the property.

BUCKNILL L.J. We need not trouble you, Mr. Howard, to reply. Counsel for the agents has agreed that in order to give this contract between the plaintiffs, the agents, and the defendant, the principal, business efficacy, certain implied terms must be inserted. The first term was that the contract would not continue in force, if before the plaintiffs introduced a person able, ready and willing to buy, the authority had been withdrawn by the defendant. That, I think, is a very sensible implied term,

(1) [1947] K. B. 130.

(2) [1949] 1 K. B. 227, 231.

because it would effectively prevent any risk of having to pay a double commission. If the defendant's wife had taken the trouble to study and to remember or write down the rather stringent terms to which she put her signature, she could have saved all this trouble by simply telephoning to the plaintiffs and saying: "We have interviewed a man who is "going to buy the bungalow. Do not send anybody round "to see it." She did not do so, although she had plenty of time—all the morning and some time in the afternoon—to do so. Another implied term which Mr. Howard admitted must be read into this contract was that commission would not be payable if the property had been already sold before the person able, ready and willing to purchase the bungalow had been introduced. The judge, instead of limiting the implied term to an actual sale, has gone beyond that, and said, in effect, that commission is not payable, if the property has been taken off the market—"not legally, but in a business sense." With due respect to the judge, I think that either the bungalow had been sold or it had not. It is clear that it had not been sold at the time when Mr. and Mrs. Payne arrived at the bungalow in the afternoon of October 5. As it had not been sold, I think that the contract was still in existence. Its terms are plain. It is not disputed that Mr. Payne was a man able, ready and willing to purchase the property in the afternoon of October 5. The property was not in fact sold at that time. That being so, I think the defendant is liable.

I need not refer to the cases which have been drawn to our attention in the course of the argument, except to point out that in no less than three cases a contract in its essentials similar to this has been before the courts and, in each case, the defendant has been held liable to pay commission, although in fact the person introduced has not purchased the property. In my judgment this appeal should be allowed.

COHEN L.J.: I am of the same opinion. The merits of this case I think are all with the defendant, but Mr. Howard's able argument has convinced me that the plaintiffs are entitled to succeed. In the leading case of *Luxor (Eastbourne) Ld.* v. *Cooper* (1), to which we were referred, it was pointed out by Viscount Simon L.C., that there were at least three different classes of cases in which the question of the right to commission could arise. He states the first of them in these terms (2):

(1) [1941] A. C. 108.

(2) Ibid. 120.

C. A.
1949

E. P. Nelson & Co. v. Rolfe.

Cohen L.J.

"There is the class in which the agent is promised a commission "by his principal if he succeeds in introducing to his principal "a person who makes an adequate offer, usually an offer of "not less than the stipulated amount. If that is all that is "needed in order to earn his reward, it is obvious that he is "entitled to be paid when this has been done, whether his "principal accepts the offer and carries through the bargain "or not. No implied term is needed to secure this result." It is not disputed by Mr. Morris that the present case falls within that class of the cases in which commission may become payable; and, as my Lord has pointed out, in such a case it has been held that, in the absence of other circumstances, once the introduction is proved, the commission is recoverable as soon as the introduction has been effected. Mr. Howard admits that even in this class of case some limitation must be implied, and he says that there are three events in which, notwithstanding the introduction, commission would not be payable: the first is, if, before introduction, the authority is withdrawn; the second is, if the property has already been sold, and the third is, if the principal has entered into a binding contract to sell to somebody else. In the present case the county court judge has introduced a fourth, namely, if the property was not for sale, because the owner refused to sell to the person introduced by the agent, by reason of some arrangement not binding in law, but binding morally or as a matter of business. This opinion of the judge involves the implication of a term which is not to be found in the contract itself, and, as Viscount Simon pointed out in the *Luxor* case (1), "in contracts made with commission agents "there is no justification for introducing an implied term "unless it is necessary to do so for the purpose of giving to the "contract the business effect which both parties to it intended "it should have." The same view is expressed at rather greater length by Lord Wright (2), where the learned lord ends his statement of the law with these words: "The implica-"tion must arise inevitably to give effect to the intention of "the parties."

In considering whether or not we can imply here either of two terms which were suggested by Mr. Morris as necessary in order to support the judgment of the county court judge, I think it would be convenient to apply the well-known test of the officious bystander. Before I turn to that, let me state what I understood to be the terms which Mr. Morris suggested. The first was that there should be implied a term that commission would be payable in respect of the first introduction by any agent. On this view, if there had been another agent employed on similar terms to those on which the plaintiffs were employed and he had introduced a purchaser before Mr. Payne arrived at the bungalow, no commission would be payable to the plaintiffs. In the alternative, he said that there must be an implied term that if the vendor had justifiably, as he put it, withdrawn the property, the commission would not be payable. I do not think it is possible to say that if the officious bystander had turned to the parties and said: "Suppose the existence of a state of facts contemplated "by either of these two implied terms, would commission "have been payable?" that they would both have answered: "Of course not." It seems to me that it is one proposition to ask an estate agent to say that he would have agreed not to claim commission, if the vendor, his principal had bound himself to sell to somebody else and it is quite a different proposition to say that he would have agreed not to claim commission if the property had been withdrawn from the market by reason of some arrangement, not binding in law, but which the vendor might choose to think was binding on him honourably or as a business arrangement. The county court judge has said a different question might arise if the vendor had "improperly or arbitrarily or whimsically withdrawn the property"; but it seems to me that the court would be placed in a difficult position if it had to go into considerations of that kind.

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(1) [1941] A. C. 108, 120.

(2) Ibid. 137.

Finally, I would say that, even if one implied the first of the two terms that Mr. Morris suggested, I am not sure that it would help him, because in the present case, so far as the evidence goes, it would appear that the other firm, Messrs. Cowdrey & Co., had not induced the defendant's wife to sign an agreement in this very wide and, as it seems to me at first sight, rather undesirable form, that had been supplied to her by the plaintiffs. If that is so, the mere introduction of Mr. Emile to the defendant would not have given that firm any right to a commission. It seems to me that even if we implied the first term, as Mr. Morris asked us to do, it would not have secured judgment for him. For these reasons I agree that the appeal should be allowed.

C. A.
1949
E. P. NELSON & Co. v. ROLFE.

ASQUITH L.J.: I also agree. I do not think the term, introduced into the contract by the county court judge ought to have been implied since it was not necessary or inevitable. The plaintiffs have performed the literal terms of their contract by introducing a person ready, willing and able to buy the bungalow—Mr. Payne, and I do not see the necessity for an implied term that they are to forfeit their right to commission simply because before the introduction the defendant had entered into an arrangement with a third person which made him feel himself morally bound to sell to such third person. For these reasons, and for the others given by my Lords, I think the appeal should be allowed.

Appeal allowed.

Solicitors for the agents: *W. R. Bennett & Co.*
Solicitors for the principal: *Mawby, Barrie and Letts.*

C. G. M.

1949
Oct. 13, 14.
Cassels J.

MINISTER OF AGRICULTURE AND FISHERIES v. MATTHEWS.

[1949 A. No. 780].

Considered. MARCROFT WAGONS LD. v. SMITH [1951] 2 K. B. 496

Emergency legislation—Possession of land taken by competent authority—Agreement between authority and permitted occupier—Tenancy—No power in authority to create—Ultra vires—Estoppel—Defence (General) Regulations, 1939 (*St. R. & O. No.* 927), *reg.* 51 (1) (2).

Where the Minister of Agriculture and Fisheries, acting in pursuance of the powers conferred on him by reg. 51 of the Defence (General) Regulations, 1939, has taken possession of farm land which has not been cultivated in accordance with the principles of good husbandry, he has no power to create a tenancy of the land in favour of a person who has been allowed to occupy it, since such an act would be ultra vires the powers conferred on the Minister, and where the occupier is in possession of the land under an agreement with the Minister, the latter is not estopped from denying that a tenancy exists.

ACTION.

On December 1, 1942, the Minister of Agriculture and Fisheries, by his agents, the War Agricultural Executive Committee for the county of Norfolk, in the exercise of the powers conferred by reg. 51 of the Defence (General) Regulations, 1939 (1), took possession, for agricultural purposes of 294,948 acres of land in the parish of Oxborough, Norfolk, on the ground that the land was not being cultivated in accordance with the rules of good husbandry. On October 11, 1944, under the terms of an agreement entered into with the Minister on October 24, 1945, the defendant W. W. Matthews went into possession of the land. In the agreement in question the defendant was described as " the tenant " and many of the terms of the agreement were such as are found in an ordinary tenancy agreement of agricultural land. The agreement was expressed to be from October 11, 1944, for the " duration of the war as defined in the Agriculture (Miscel- " laneous War Provisions) Act, 1940, and thereafter to the " expiration of three years from the end of the said war " period or if the said three years shall not expire on the " eleventh day of October, then to the eleventh day of October " before the expiration of the said three years." By s. 30, sub-s. 1 (*c*), of the Agriculture (Miscellaneous War Provisions)

(1) Defence (General) Regulations, 1939. Regulation 51, para. (1.): " A competent " authority, if it appears to " that authority to be necessary " or expedient to do so in the " interests of the public safety, " the defence of the realm or the " efficient prosecution of the war, " or for maintaining supplies and " services essential to the life " of the community, may take " possession of any land, and may " give such directions as appear " to the competent authority to " be necessary or expedient in " connexion with the taking " possession of that land."

Paragraph (2): " While any " land is in the possession of a " competent authority by virtue " of this regulation . . . . the " land may, notwithstanding " any restriction imposed on the " use thereof (whether by any " Act or other instrument or " otherwise) be used by, or under " the authority of, the competent " authority for such purpose, and " in such manner as that " authority thinks expedient in " the interests of the public " safety, the defence of the realm " or the efficient prosecution of " the war, or for maintaining " supplies and services essential " to the life of the community, " and the competent authority, " so far as it appears to it to be " necessary or expedient in " connexion with the taking of " possession . . . . (*a*) may do, " or authorize persons using the " land as aforesaid to do, in " relation to the land, anything " which any person having an " interest in the land would be " entitled to do by virtue of " that interest . . . ."

Paragraph (5): " A com" petent authority may, to such " extent and subject to such " restrictions as it thinks proper, " delegate all or any of its func" tions under paragraphs (1) to " (3) of this regulation to any " specified persons or class of " persons."

Act, 1940: "the expression 'war period' means the period "for which the Emergency Powers (Defence) Act, 1939, is "in force." Under the Emergency Powers (Defence) Act, 1945, s. 1, sub-s. 1, the Emergency Powers (Defence) Act, 1939, under which the Defence (General) Regulations, 1939, were made, expired on February 24, 1946, with the result that the agreement of October 24, 1945, made with the defendant expired on October 11, 1948. The defendant remained in occupation of the land after that date and on March 14, 1949, a writ was issued by the plaintiff, claiming possession of the land, the subject of the agreement, and certain sums of money alleged to be due thereunder. By his defence, the defendant pleaded that by the agreement of October 24, 1945, the Minister had vested in him a tenancy determinable by notice as prescribed in the Validation of War-time Leases Act, 1944, and the provisions of the Agricultural Holdings Act, 1923, which, with certain exceptions, were expressed to apply to the agreement, and that in the absence of the appropriate notice under the above Acts to which he was entitled, the tenancy was still subsisting and the tenant was entitled to retain the possession and occupation of the land. In the alternative the defendant pleaded that the Minister by the solemn act of his entry into the agreement was estopped from denying that he had vested a tenancy in the defendant. The defendant also counterclaimed for damages on the ground that, by the agreement, the Minister had contracted to grant him a tenancy, and if the Minister had not in fact vested any tenancy in the defendant, he had thereby broken the contract contained in the agreement and the defendant claimed damages for such breach. By his reply the Minister pleaded that if and in so far as the agreement in question purported to create, or to vest in the defendant a tenancy, or if by such agreement the Minister contracted to grant to the defendant a tenancy of the land, the subject of the agreement then, in either case, the Minister was acting ultra vires and the agreement was of no effect to create a tenancy or to constitute a contract to grant a tenancy to the defendant.

Upjohn K.C. and *B. S. Wingate-Saul* for the plaintiff.
L. A. Blundell for the defendant.

CASSELS J. after stating the facts and reading the material regulations, continued: The first issue to be decided is what is the nature of the agreement in the present case? Is it a tenancy agreement or is it an agreement merely giving the defendant leave and licence to be in occupation of the land? At first reading the words and phrases used, and I think unfortunately used, in this document might easily lead one to regard it as a tenancy agreement. I find such words and phrases as these: "the Minister agrees to let"; "the tenant "agrees to take the land"; "the rent"; "additional "rent"; "during his tenancy"; "good tenantable repair"; "shall not assign or under-let"; "non-payment of rent." It almost seems, in fact, that whoever drafted the agreement had left nothing out which could make it look more like a tenancy agreement. The Minister, of course, has only such powers as the statute confers on him. He is not the owner of the land and he has no interest in it. He merely has possession through the agricultural committee under the Defence regulations. He cannot grant a lease because he has not one himself; he can only pass on what he has, namely, the use of the land. In the recent case of *Lewisham Borough Council* v. *Roberts* (1), Denning L.J. in considering this very point said: "It is necessary to consider the nature of "the power to requisition land. It is only a power to take "possession of land. It is not a power to acquire any estate "or interest in any land. (See s. 1, sub-s. 2 (*b*) (i), of the "Emergency Powers (Defence) Act, 1939, and ss. 1 and 2 "of the Compensation (Defence) Act, 1939.) Once possession "is taken the Crown can exercise all the powers incident to "possession, such as to licence other people to use the premises: "(see *Southgate Borough Council* v. *Watson* (2)); but it cannot "grant a lease or create any legal interest in the land in favour "of any other person because it has itself no estate in the "land out of which to carve any interest. Once possession "is taken, the Crown, of course, has all the rights incident "to possession and may by itself or its agents or sub-agents "exercise all the possessory remedies. A government depart-"ment, or a town clerk, or a local authority, who is in "possession on behalf of the Crown may, therefore, like a "bailiff, bring an action of trespass against anyone who "disturbs that possession: *Erith Corporation* v. *Holder* (3); "and the fact of being in possession is good as against purchasers "without being registered on the Land Charges Register:

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(1) [1949] 2 K. B. 608, 622, 623.

(2) [1944] K. B. 541.

(3) [1949] 2 K. B. 46.

"(see *Lewisham Borough Council* v. *Maloney* (1)). None of "this, however, confers a legal estate or even an equitable "interest on the Crown. The basis of it all is possession." It is right to note that those observations were made in the course of a dissenting judgment, but the other members of the court did not deal with this particular matter.

Southgate Borough Council v. *Watson* (2) to which Denning L.J. referred was an appeal from the Edmonton county court and the headnote is: "A competent authority "who has requisitioned a house under reg. 51 of the Defence "(General) Regulations, 1939, under powers delegated by the "Minister of Health, has no power to create a tenancy with "regard to that house, and the person who has been let into "possession of the requisitioned house because he has been "rendered homeless by enemy action and has been required "to pay rent for that accommodation is not thereby made "a tenant thereof so as to enable him to claim the protection "of the Rent Restrictions Acts."

Scott L.J. in giving judgment said (3): "The question in this "case is whether the competent authority who requisitioned "the house had power under the Defence Regulations to "create a tenancy, turning himself into a landlord and turning "into a tenant the person who was put into possession of the "house because he had lost possession of his own house by "enemy action. The county court judge gave a simple, "short and entirely sound judgment in which he held that "no tenancy had been created. I think that right."

For the defendant in the present case it is contended that he has a tenancy determinable by notice which he has not received, and that the plaintiff had power to create a tenancy. The defendant does not say that he has a tenancy as against the true owner of the land but only as against the plaintiff until the regulations cease to have effect, and a title paramount prevails. I have to bear in mind that the plaintiff, the Minister, was brought into existence by statute; his powers are statutory, and the power to take possession is not a power to take ownership.

Apart from possession, the Minister has no interest in the land which he could convey. He has no lease, for instance, the whole or part of which he could grant or assign. He could only part with possession. He has statutory possession and his only power was to make a contract for the statutory occupation or use of the land. That being so, it is contended on behalf of the Minister that if, by the agreement of October 24, 1945, he was purporting to grant a tenancy, then he was acting ultra vires because he could only act within his powers and could only part with what he had, and that was possession of the land. It was contended on behalf of the defendant that the plaintiff "by the solemn act of his entry into the "said agreement is estopped from denying that he has vested "in the defendant such a tenancy as aforesaid." That point is of some importance and was quite properly and forcefully taken. It may well be that if it had been a private individual who had entered into this contract, he would have been estopped from denying that a tenancy had been created, or at any rate he might have been held liable in an action for damages, but the plaintiff is a statutory body and not an actual person and can, therefore, only perform the acts which he is empowered to perform. If, therefore, the Minister does something which is an ultra vires act, it is not the act of the Minister at all. In the unreported case of *Minister of Agriculture and Fisheries* v. *Hulkin*, the present plaintiff was suing for the possession of a cottage and garden which was in the possession of the defendant. The action was brought in the county court and the county court judge took the view that under the relevant defence regulations, it was competent for the County Agricultural Committee, acting under the authority of the Minister, and as the delegate of the Minister's own powers, to create a relationship of landlord and tenant between the Minister and the defendant. The case went to the Court of Appeal and the appeal of the plaintiff was allowed. The first point which called for consideration was the finding of the county court judge that under the regulation the Minister had power to create a tenancy and that, by the document relied on in that case, he had in fact done so. In the Court of Appeal the defendant's counsel disclaimed any intention of attempting to support the county court judge's judgment on that point. He contended, however, that the Minister having done what he had done in that case was estopped from denying that the document under which the defendant was in possession, created a tenancy. In dealing with that contention, Lord Greene M.R. said: "He" (the defendant's counsel) "suggested, first of all, that "even assuming, as he conceded, that the regulations gave

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(1) [1948] 1 K. B. 50.

(2) [1944] K. B. 541.

(3) Ibid. 544.

1949

Minister of Agriculture and Fisheries v. Matthews.

Cassels J.

"no power to the Minister to create a tenancy, nevertheless "the Minister was estopped from denying that the document "in question did create a tenancy and, accordingly the "relationship must be regarded as one of landlord and tenant. "There is, I think, a very short answer to that. Accepting "the view which Mr. Baillieu" (the defendant's counsel) "accepts, that the Minister had no power under the regulations "to grant a tenancy, it is perfectly manifest to my mind "that he could not by estoppel give himself such power. "The power given to an authority under a statute is limited "to the four corners of the power given. It would entirely "destroy the whole doctrine of ultra vires if it was possible "for the donee of a statutory power to extend his power by "creating an estoppel. That point, I think, can be shortly "disposed of." I have come to the conclusion that the present case was one of leave and licence only, and in such a case no notice, or at most a reasonable notice according to the circumstances, would be required to terminate the arrangement. In my opinion the plaintiff is entitled to judgment for possession. There is a counterclaim by the defendant for damages on the ground that inasmuch as the plaintiff purported to be granting a tenancy to the defendant —and as I have said, when the document is read, it reads more like a tenancy agreement than anything else—there has been a breach of contract on the part of the plaintiff. The defendant claims to be entitled as damages to the difference in value to him of the tenancy he would have had if the contract had been properly carried out and the agreement had been that which it purported to be, and the value of the licence which he received. There is no doubt that if he had been a tenant in the ordinary way, he might very well have enjoyed the benefit of one or two of the favourable positions in which a tenant is placed under the various Acts of Parliament which have been passed and to which I have been referred. He might, for instance, have been entitled to a month's notice or to a year's notice with a tenancy likely to last for ten years, and of none of these does he get the advantage. I think, however, that the answer must again prevail that an ultra vires act done by a statutory body whose powers are limited by the statute or statutes which brought it into existence and subsequently regulate its actions, is not an act at all. I therefore think that the defendant's counterclaim must fail and that he is not entitled to any damages.

That being so there must be judgment for the plaintiff on the claim for possession and also on the defendant's counterclaim.

Judgment for the plaintiff on claim and counterclaim.

Solicitor for the plaintiff: *Official Solicitor, Ministry of Agriculture and Fisheries.*

Solicitors for the defendant: *Ellis and Fairbairn.*

P. B. D.

Applied. R. v. LUMSDEN. [1951] 1 All E.R. 1101.

C. C. A.

1949
Oct. 14

Lord Goddard C.J., Croom-Johnson and Lynskey JJ.

REX *v.* PARKIN.

Criminal law—Person "found by night in a building"—Prisoner with one hand over window—Conviction quashed—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 28, *sub-s.* 4.

The appellant was convicted at quarter sessions upon a charge of being found by night in a building with intent to commit a felony therein, and sentenced to four months' imprisonment. The appellant was seen by a policeman shortly after midnight up a pipe at the side of a cinema. He (the appellant) was standing on the junction of two pipes, his head and shoulders being close to a window. He had one hand over the window and was gripping the sill to lever himself in.

Held, that the word "in" must be given its ordinary meaning and in the circumstances of the case the prisoner was wrongly convicted as he was not "in" the building but outside attempting to get in.

APPEAL against conviction.

The appellant, John Henry Parkin, was convicted at West Kent quarter sessions on a charge of being found by night in a building with intent to commit a felony, and sentenced to four months' imprisonment. Shortly after midnight on July 16, 1949, a policeman saw the appellant up a pipe at the side of the Granada Cinema, Sevenoaks. He was standing on the junction of one pipe with another pipe, his head and shoulders being close to a window. He had one hand over the window and was gripping the sill to lever himself in. It was contended for the prosecution that in the circumstances the appellant was "in" the building within the meaning of s. 28, sub-s. 4 of the Larceny Act, 1916 (1). Counsel for the appellant contended that in law the appellant was not "in" the building.

W. I. Percival for the appellant.
Maxwell Turner for the Crown.

Lynskey J. delivered the judgment of the court, in which he stated the facts and continued: The whole point here is that a submission was made on behalf of the appellant at the trial that on the facts of the case he was not "in" the building within the meaning of s. 28, sub-s. 4 of the Larceny Act, 1916. The prosecution on the other hand contended that had he been charged with breaking and entering, the fact that he had one arm through the window would be sufficient entry for the purposes of constituting the offence of breaking and entering. We have to construe this statute according to its clear words. The question is, what do the words "being found in any building" mean. One has to apply the ordinary meaning, unless the context requires one to give them some unusual meaning. The ordinary meaning of the words as applied to the circumstances of this case is that the appellant was not found "in" the building but outside, attempting to get into it. In those circumstances, of whatever other offence he may have been guilty he was not guilty of the particular offence with which he was charged, namely, being found in the building with intent to commit a felony. The appeal will be allowed and the conviction quashed.

Appeal allowed.

Solicitor for the appellant: *The Registrar, Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

(1) Larceny Act, 1916, s. 28, sub-s. 4: "Every person "who shall be found by "night . . . . (4) in any "building with 'intent to "'commit any felony therein' "shall be guilty of a "misdemeanor . . . ."

L. F. J. McD.

Affirmed.
[1951] 1 K. B. 162

BOGUSLAWSKI AND ANOTHER *v.* GDYNIA-AMERYKA LINIE.

1949
June 27, 28, 29, 30; *July* 1, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 21.

Finnemore J.

International law—Polish Government—Former Polish Government resident in London—Recognition by British Government of new Polish Government from midnight on certain date—New Polish Government established in Poland before time of recognition—Agreement between minister of former Polish Government and employees of owners of Polish ships—Agreement made before moment of recognition of new Polish Government but after its establishment in Poland—Question of retroactivity of time of recognition to date of "de facto" establishment of new Polish Government—Whether agreement by minister of former Polish Government void on ground of retroactivity of time of recognition.

At all material times prior to midnight of July 5/6, 1945, the Polish Government which was originally formed in Warsaw was established in London. At a meeting held on July 3, 1945, in London between the minister of that government designated the Minister of Industry, Commerce and Shipping (acting on behalf of the Polish shipping companies under powers given to him by previous legislation of that government) on the one hand and the respective representatives of the unions of Polish ship officers and seamen (acting on behalf of their respective members) on the other hand, it was agreed that in the event of any of such members leaving their respective employments they would be entitled to receive compensation on an equal footing with the employees of the Polish State, namely, three months' salary. On June 28, 1945, the provisional Polish Government of National Unity was formed in Lublin, Poland, and by a certificate signed by the British Foreign Secretary on behalf of His Majesty's Government it was certified that up to and including midnight of July 5/6, 1945, His Majesty's Government recognized the Polish Government having its headquarters in London as being the government of Poland and as from midnight of July 5/6, 1945, His Majesty's Government recognized the Polish Provisional Government of National Unity as the government of Poland and as from that date ceased to recognize the former Polish Government having its headquarters in London as being the government of Poland.

The first plaintiff had been an officer in the employment of the defendants who were a Polish shipping company having its headquarters in London and the second plaintiff had been a seaman in that employment. On July 5, 1945, both plaintiffs left the defendants' ship on which they were employed and which was lying in English waters and they ceased to be employed by the defendants. They then claimed from the defendants compensation on the basis of three months' salary in accordance with

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

the agreement of July 3, 1945. The defendants refused to pay any compensation and they contended that on July 3, 1945, the former Polish Government no longer had any power to make any agreement on behalf of any Polish shipping company, because it had by then been replaced by the Polish Provisional Government of National Unity as from June 28, 1945, and they also contended that the certificate of the British Foreign Secretary which recognized the Polish Provisional Government of National Unity had retroactive effect back to June 28, 1945.

Held, that normally when the government of this country recognized the government of a foreign country it recognized it back to the time when it became over any particular area the effective de facto government; the new Lublin Government, however, up to midnight of July 5/6, 1945, never had any control over any Polish ships and Polish seamen because they were far removed from any area over which that government exercised any authority; on the contrary right up to that moment the only government which this country recognized as the government of Poland and the only government which in fact had any control over the ships and seamen concerned with the agreement of July 3, 1945, was the original Polish Government then established in London; furthermore, the effect of the certificate of the British Foreign Secretary was that the government of this country certified that it recognized the government of a foreign country up to midnight of July 5/6, 1945, and that it recognized another government of that country after that moment; it followed that the acts done by the former government of that country before that moment must be valid and there could be no retroactive effect of the recognition of the new government back to June 28, 1945, because otherwise the certificate would mean little or nothing; accordingly, as the terms of the agreement of July 3, 1945, were in accordance with the law which was then being administered by the former Polish Government, the Minister of Industry, Commerce and Shipping of that government had power to enter into that agreement on behalf of the defendants and the court should enforce its terms against the defendants.

Aksionairnoye Obschestvo A. M. Luther v. *James Sagor & Co.* [1921] 3 K. B. 532. distinguished.

The plaintiffs' claim was for compensation on the basis of three months' salary which they alleged was payable to them on the termination of their employment on the ships of the defendants, a company of ship owners incorporated under Polish law and having their domicile in Warsaw but carrying on business in England. The first plaintiff was at all material times the second engineer of the defendants' ship *Morska Wola* and he was a member of the Polish Captains' and Officers' Union, hereinafter called the "Officers' Union." The second plaintiff was at all material times a seaman employed on various ships belonging to the defendants, the last employment being on the ship *Morska Wola*. At all material times prior to midnight of July 5/6, 1945, the Polish Government which was originally formed in Warsaw was established in London. By art. 13, sub-s. 1 of an Act of the Republic of Poland published on March 30, 1939, it was provided that in the event of war all transport and communications should be subordinate to defence requirements and by art. 19 it was provided that in such an event all shipping companies should be placed under the supreme management of the Polish Minister of Industry and Commerce, subsequently designated the Minister of Industry, Commerce and Shipping.

At a meeting held on July 3, 1945, in London, between that Minister (acting for and on behalf of the Polish shipping companies) on the one hand and the representatives of the Officers' Union and of the Seamen's Union (acting on behalf of their respective members) on the other hand, it was agreed that in the event of such members leaving their ships they should be entitled to receive compensation on an equal footing with employees of the Polish State, namely, at least three months' salary. The said minister entered into such agreement in pursuance of powers conferred on him by a decree of the Polish Government published in London, dated June 28, 1945. On July 5, 1945, the plaintiffs, who were employed on the ship *Morska Wola* then lying in the Manchester Ship Canal, were informed of the terms of the agreement of July 3, 1945; whereupon they left that ship and ceased to be employed by the defendants.

On June 28, 1945, the Polish Provisional Government of National Unity was formed at Lublin, Poland, and was duly recognized by His Majesty's Government as from midnight of July 5/6, 1945. The certificate of recognition was signed by the British Foreign Secretary and was as follows: " . . . . 1. Up to and including midnight of July 5/6, 1945, " His Majesty's Government in the United Kingdom recognized " the Polish Government having its headquarters in London " as being the Government of Poland and as from midnight " of July 5/6, 1945, His Majesty's Government in the United " Kingdom recognized the Polish Provisional Government " of National Unity as the Government of Poland, and as " from that date ceased to recognize the former Polish Government " having its headquarters in London as being the " Government of Poland. 2. On June 29, 1945, the following

1949

Bogus-lawski v. Gdynia-Ameryka Linie.

" message to the Prime Minister from the head of the said " Polish Provisional Government of National Unity was " handed by the Polish Ambassador in Moscow to His Majesty's " Ambassador in Moscow : ' I have the honour to notify you " ' that as a result of the understanding reached in Moscow " ' between the representatives of the Warsaw Provisional " ' Government and Polish democratic leaders invited from " ' Poland and from abroad under the auspices of the Com- " ' mission of Three set up at the Crimea conference, the " ' Provisional Polish Government of National Unity was " ' formed this June 28 according to art. 45 of the constitution " ' of the Polish Republic, 1921.

" ' The Provisional Government of National Unity has " ' realized in their entirety decisions of the Crimea conference " ' on the Polish question. At the same time I have the " ' honour in the name of the Provisional Government of " ' National Unity to approach His Majesty's Government " ' in the United Kingdom of Great Britain and Northern " ' Ireland with a request for the establishment of diplomatic " ' relations between our nations and for exchange of representa- " ' tives with the rank of ambassadors. 3. I am advised that " the question of the retroactive effect of recognition of a " government is a question of law for decision by the courts."

The first plaintiff claimed 176*l*. 5*s*. 0*d*. and the second plaintiff claimed 123*l*. as compensation on the basis of three months' salary from July 5, 1945.

The defendants denied liability on several grounds, all of them except one depending upon the proper construction of Polish law and its application to the facts of the case. The one ground which did not depend upon the construction of Polish law is the only ground which is relevant to this report and it was that as the new government of Poland had been lawfully formed on June 28, 1945, the agreement made on July 3, 1945, by the Minister of Industry, Commerce and Shipping of the former Polish Government resident in London was of no effect because that former government was as from June 28, 1945, no longer competent to carry out any legislative-administrative or other functions appertaining to the government of Poland and the certificate of the British Foreign Secretary recognizing the new government had retroactive effect to June 28, 1945. The plaintiffs on the other hand contended that the recognition of the new Polish Government as from midnight of July 5/6, 1945, had no retroactive effect and relied upon the express statement in the certificate of the British Foreign Secretary that His Majesty's Government recognized the former government as being the government of Poland " up to and including midnight of July 5/6, 1945."

Linton Thorp K.C., H. L. Parker and *Niall MacDermot* for the plaintiffs.

D. N. Pritt K.C., Scott Henderson K.C., A. J. Hodgson and *Robin Dunn* for the defendants.

The first argument with reference to the alleged retroactivity of the recognition of the Lublin Government by the British Government was submitted on behalf of the defendants by *Scott Henderson K.C.* The Polish Provisional Government of National Unity which has been called the " Lublin " Government," became the de facto government of Poland on June 28, 1945, and therefore the British Government's recognition dated back to that date and it follows that the former Polish Government established in London, which has been called the " Warsaw Government " ceased to function as the government of Poland as from that date and all the acts which it purported to do as a government after that date had no legal effect.

The principle of the retroactivity of the recognition of a foreign government back to the date of its becoming the de facto government of the particular foreign country was clearly laid down by Lord Wright in *Lazard Brothers* v. *Midland Bank* (1) where he said with reference to the de facto recognition in 1921 and the de jure recognition in 1924 of the Soviet Government of Russia by the British Government:— " The effect of such recognition is retroactive and dates back " to the original establishment of Soviet rule which was in the " 1917 October revolution as was held by the Court of Appeal " in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor* " *& Co.* (2)." That means that the de facto recognition in 1921 and the de jure recognition in 1924 of the Soviet Government by this country had effect in this country as from October, 1917, when the Soviet Government was set up.

[FINNEMORE J. Then what is the effect of the British Secretary of Foreign Affairs saying—" I recognize the one " government up to a certain hour and the other one after " that hour ? " Do you say it does not matter what he says ?]

(1) [1933] A. C. 289, 297. (2) [1921] 3 K. B. 532.

It does not matter. That is always what happens. In the report of *Luther* v. *Sagor* (1) at p. 536, the certificate of the British Foreign Secretary is set out and that certificate said that the British Government recognized the Kerenski Government of Russia when it came into power on the determination of the Imperial Government of Russia on March 14, 1917, and it continued to recognize that Kerenski Government until December 13, 1917, when it was displaced by the Soviet authorities, but Lord Wright in the above cited passage held that the subsequent recognition of the Soviet Government by this government dated back to October, 1917, when the Soviet Government became the de facto government of Russia. It follows that the Warsaw Government was no longer the valid government of Poland on July 3, 1945, the date of the agreement and therefore the agreement was void. [He also referred to the United States case of *Guaranty Trust Co.* v. *United States* (2).]

Linton Thorp K.C. for the plaintiff. The submission of counsel for the defendants about the retroactivity of the recognition by this country of a foreign government to the time when it became the de facto government of a particular country should only be accepted with certain qualifications and particularly in regard to its geographical limitation. Both in the case of *Lazard Brothers* v. *Midland Bank* (3) and in the case of *Luther* v. *Sagor* (1) it was laid down that the recognition dated back to the time when the foreign government became the de facto government over a particular i.e. geographical area. The de facto recognition by the government of this country of the Soviet Government in 1921 and the de jure recognition of that government in 1924 dated back to October, 1917, when the Soviet Government began to act as a government, but such recognition only dated back in respect of that particular geographical area in Russia over which it was proved that the Soviet Government actually had become the de facto government. The position in this case was that before midnight of July 5/6, 1945, the Warsaw Government was both the de jure and the de facto government of Poland in this country. It was not the de facto government in Poland because the Germans had over-run Poland, but it was the de jure government in Poland. An illustration of how that government was both the de jure and the de facto

(1) [1921] 3 K. B 532.

(2) (1937) 304 U. S. 126.

(3) [1933] A. C 289, 297.

government of Poland in this country is the fact that it had its own courts here which administered its own law over Polish nationals and shipping in this country. Furthermore, up to July 5/6, 1945, the only government of Poland with which Polish seamen in this country could deal or with which they could make contracts was the Warsaw Government. There was no other Polish government in this country before that particular moment. There is no real evidence that the Lublin Government was actually in Lublin on July 28, 1945, because according to the British Foreign Secretary's certificate it appeared to be resident in Moscow. However, let it be assumed that the Lublin Government was the de facto government of the whole of Poland on June 28, 1945. That fact could not and did not make it the de facto and, a fortiori, the de jure government of Poland in this country on that date. It never became the de facto government of Poland in this country until after midnight of July 5/6, 1945, when it became the de facto and the de jure government of Poland. There is not a single authority which can show that the doctrine of retroactivity has extended back to any geographical area where the new government was not in actual de facto control.

What in effect His Majesty's Government says to a new revolutionary government in any country is this : " In the " area in which you are the de facto government we recognize " your acts but we do not recognize you where you have never " been at all."

The decision in the case of *Haile Selassie* v. *Cable & Wireless Limited, No.* 2 (1), is in conformity with this principle. In that case Haile Selassie who had been Emperor of Abyssinia claimed a chose in action which was then situate in Abyssinia. At the time of the commencement of the proceedings this country had not recognized the King of Italy as the de jure sovereign of Abyssinia, and it continued to recognize Haile Selassie as its de jure sovereign. By the time, however, that the case reached the Court of Appeal this country had recognized the King of Italy as the de jure sovereign of Abyssinia and it was, therefore, held that such recognition dated back to the time when the government of the King of Italy had become the de facto government of Abyssinia, that is to a time before the action was commenced and, therefore, Haile Selassie could not legally claim the chose in action, for the simple reason that the chose in action had vested in

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(1) [1939] Ch. 182.

1949

BOGUSLAWSKI
v.
GDYNIA-AMERYKA LINIE.

Abyssinia in the King of Italy. The principle of that case in no way conflicts with the principle of this case. In that case a chose in action belonging to the former government of Abyssinia was situate in Abyssinia, and it was proved that before the action commenced the new government, namely the government of Italy had de facto control over the whole of Abyssinia and, therefore, it had de facto control over the chose in action. Consequently when subsequently this country recognized the King of Italy as the de jure sovereign of Abyssinia, that recognition had retroactive effect back to the time when the government of Italy had acquired the de facto control of Abyssinia. Here the Lublin Government never had any control of Polish nationals in England or of Polish shipping in English waters until after midnight of July 5/6, 1945. I submit that the court should adopt the reasoning of the Supreme Court of the United States of America in the case of the *Guaranty Trust Co.* v. *United States* (1), because that case lays down with the utmost clearness the principle which I have been putting to the court. That was a case of the recognition by the government of the United States of America of the Soviet Government of Russia and it was contended by the defendant, the government of the United States, that because it had recognized the Soviet Government, therefore that recognition dated back to make contracts void which the citizens of the United States had made with the diplomatic representatives of the former Kerenski Government of Russia, because at the date of those contracts the Soviet Government had actually become the de facto government of Russia. Stout J., who gave the judgment said (2): "The argument "thus ignores the distinction between the effect of our recogni-"tion of a foreign government with respect to its acts within "its own territory prior to the recognition and the effect upon "prior transactions consummated here between its predecessor "and our own nationals."

In *Lazard Brothers* v. *Midland Bank* (3) Lord Wright said: "No question is here involved of the extra-territorial effect of "legislation confiscatory or otherwise." In this case the defence of retroactivity entirely depends on the extra-territorial effect on Polish seamen and shipping in England of the formation of the Lublin Government on June 28, 1945. It follows that Lord Wright's observations cannot help the defendants.

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(1) 304 U. S. 126.

(2) Ibid, 140.

(3) [1933] A. C. 289, 297.

The Foreign Secretary's certificate conclusively shows that His Majesty's Government recognized the Warsaw Government as the government of Poland up to midnight of July 5/6, 1945. In view of the very definite and precise form of that certificate it is really impossible to assert with any success that the Lublin Government before that moment had any control over Polish seamen or shipping in England. It is immaterial for the purpose of the plaintiff's case to consider whether the Lublin Government had or had not on July 3, 1945, de facto control in Poland. What is material for that purpose is whether or not on that date the Lublin Government had de facto control over Polish seamen and shipping in England and that question has been conclusively answered in the negative by the certificate. [He also referred to *Bank of Ethiopia* v. *National Bank of Egypt and Ligouri* (1) and *Banco de Bilbao* v. *Sancha* (2).]

Cur. adv. vult.

July 21. Finnemore J. This is a case in which the plaintiffs are two Polish seamen or, to be strictly accurate, a Polish officer, Jan Boguslawski, who was the second engineer on a ship at the material times, and a seaman, Stanislaw Krupka, who was a carpenter employed in the Polish merchant navy. They are claiming an amount of money which, as to amount, is not in dispute, and which is three months' wages ; and they claim it against the defendants, who are a Polish shipping line, on the ground that when, in July of 1945, the plaintiffs left their ships and ceased thereafter to be employed on them, they were entitled to this gratuity, or bonus, or compensation, in view of an obligation or contract which had been entered into by or on behalf of the defendants.

The case has taken a long time to try, and it has involved a good many points, most of them points of Polish law.

I do not think that the facts are very much, if at all, in dispute. One matter that is difficult, perhaps, is the approach of the court to the laws of another country, which, although the trial is in this court and according to our procedure, are by common consent the law which has to govern the actions of the parties in this case.

On September 1, 1939, the German Government, as everybody knows, attacked Poland, and in a very short time the country was completely overrun and occupied, mainly by German forces and partly by Russian. In consequence of that, the Polish Government, to escape the invader, went to France, and carried on for some time at Angers.

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(1) [1937] Ch. 513.

(2) [1938] 2 K. B. 176.

After the fall of France in 1940, the Polish Government, which had been admittedly the legitimate government up to the outbreak of the war, moved to London, and they, until the matters that we are considering in this case, continued to be the Polish Government. That government looked after all Poles who had escaped from Poland, including in particular Polish seamen and officers, and Polish ships ; and under the ægis of the government considerable work, some of it of a very valuable kind, and involving great bravery on the part of those who undertook it, was done in pursuit of the war effort in ships of the Polish merchant navy.

On March 30, 1939, an Act of Parliament, as we should call it, was passed in Poland dealing with transport in general, and with shipping companies and ships in particular. I shall have to refer to this in detail later on, but for the moment it suffices to say that that Act handed over the supreme management or control of shipping companies to the Minister (as he afterwards became) of Shipping, Industry and Commerce.

On February 26, 1940, another Act, which was called a decree of the President of the Republic, was passed, which made it possible to set up people who were called curators to take charge of the property of Polish corporations, and I think Polish citizens, abroad. It was obviously impossible for boards of management or boards of directors to continue to meet in Poland, and it was impossible for any property of Polish people to be administered in Poland, which was then occupied by the enemy ; and the Curator Act (as I may call it for the moment) provided that the Minister of Finance should arrange for concerns which were operating abroad and which were acquiring property abroad to be managed by people who were described as curators.

On September 2, 1942, Mr. Plinius was appointed curator of the Gdynia-Ameryka Linie Zeglugowe S/A, which is the defendant company. When I say that he was appointed curator of the company, what actually happened was that he was appointed curator to carry out the functions of the managing director as second deputy managing director of that company.

The defendant company was a shipping company, which had been in existence for some considerable time, and Mr. Plinius had been concerned with it for some considerable time. 98½ per cent. of the shares were owned by the Polish Government, and the other 1½ per cent. by a Danish concern. Mr. Plinius, who was a Dane, was the deputy managing director, he had another deputy managing director with him, and there was also a managing director who, by the statutes of the company, had to be a Polish citizen.

I think I was told that the managing director, and maybe the deputy as well, were both killed in the war, and anyway, they were not available in 1942, so that the real position was that Mr. Plinius united in himself the duties of managing director and deputy managing director, by virtue of his appointment as curator and second deputy managing director, because he already held that office as a result of his appointment by the company.

Fortunately for him, it may be, when the war broke out he was in Copenhagen. He made his way first of all to Angers, and later to London, and he was the person who thereafter ran the affairs of the shipping company from day to day, as I gather that he had done, very largely, before.

I do not doubt that he did it with great efficiency and ability, because everybody agrees, and it appeared obvious from seeing him and listening to him, that Mr. Plinius is a man of very considerable ability. He was subject, as everybody agrees, to the general control or direction, or guidance, of the Minister, who at this time was Mr. Kwapinski.

There were also two other bodies which have to be considered. They were two trade unions, or organizations of employees, one of them being the Polish Captains' and Officers' Union, of which Mr. Dabkowski, who was called to give evidence, was the chairman and was acting in 1945 also as secretary, and the other was the Polish Seamen's Union, the union for the seamen who were not officers, of which Mr. Fligiel, who was called as a witness, was chairman at all material times.

In 1945 it became fairly obvious that we were approaching the end of the German war. It also became obvious that political matters in Poland, or perhaps more particularly among Polish citizens, were becoming of great importance, and that there was developing a strong opinion which, in political matters, took very different views from those of the Polish Government in London, which was called by counsel "the Warsaw Government," meaning the government which had originally left Warsaw at the beginning of the war and had carried on thereafter in France or in England. The position ultimately was, as we know, that a government, first of all called the Lublin Government, developed. People in England, Poles in England, saw the possibility, or even the probability, of this happening, and they began to consider what was the right thing or the advisable thing to do; and on June 25, the council of ministers of the old Warsaw Government met in London. They had come to the conclusion, especially when they heard that the British Government was likely, in view of certain international commitments, to recognize the new government, that they ought to take some steps about the matter.

That being so, what they did, putting the matter shortly, was that they decided to give notice to terminate the employment of all civil servants in England, so as to leave a clear field for the new government, and they also decided to give the civil servants a gratuity which was to be not less than three months' salary according to their contracts of employment. That resolution was embodied in a decree which was dated July 3, 1945.

That decree dealt with employees of all government departments. It probably would have been incorrect to describe the employees of shipping companies as employees of government departments, although those companies were admittedly under the control of the government; and at the same meeting a resolution of the council of ministers was passed, which said: "The council of ministers authorizes the Minister of Industry, "Commerce and Shipping to pay to employees of Polish "shipping enterprises gratuity on an equal footing to that "payable to state employees, with the proviso that the "gratuity will be paid to them out of the moneys possessed "by these enterprises."

Meanwhile, the two Unions were getting concerned about the position of their members. They also knew, I have no doubt, that is to say, Mr. Dabkowski, the chairman of the Officers' Union, knew and Mr. Fligiel, the chairman of the Seamen's Union, knew, and Mr. Plinius also knew, that a great many of the sailors would not sail any longer under the new regime. They wanted to obtain for their members a similar sort of provision to that which had been given to the civil servants and the office staffs and on July 3 there was a meeting at Mr. Kwapinski's office.

On July 3, at this meeting, there were present, Mr. Kwapinski, the minister; Mr. Dabkowski, together with a colleague, and Mr. Fligiel with a colleague of his; and (I propose to state this shortly) in the result Mr. Kwapinski said that he would agree that out of the moneys of the defendant company or the other shipping companies, the sailors who in fact left their ships because of this change of government should be treated the same, or substantially the same, and should be entitled to the three months' gratuity which was being given to the other people.

Mr. Kwapinski told the trade union representatives that the government was paying three months' gratuity to civil servants, that the shipping lines were going to do the same to their office staffs, and that he was proposing that seamen should be treated in the same way.

He then, in their presence, dictated a telegram to the head of his shipping department, whom I will describe as Mr. M., and Mr. Dabkowski made a memorandum of this interview on the next day.

He set out the complete text of that telegram in Polish, and that telegram which I need not read, certainly in full, referred to what was happening about the political situation, and said that the ministers had decided to discharge all officials of the government and pay them compensation and then it said: "At the same time on the authority of the government "I made a declaration to the Minister of War Transport on "behalf of the Polish crews requesting that no ships of the "Polish merchant navy be directed to waters under the "Soviet control." That was another point that they were anxious about.

Then it said: "The trade organizations of officers and "seamen are of the view that until free unfettered and democratic elections are held they are unable to return to homeland "as well as to take ships to waters controlled by the "Soviet Union. I also asked that in this case all Polish ships "be first directed to the United Kingdom ports so as to give "the officers and seamen the possibility to disembark in ports "considered as home ports."

Then comes the part that we are considering in this case: "I also declared that in the event of their leaving the ships "owing to the above-mentioned causes the captain, officers "and seamen are entitled to compensation on equal footing "with government officials and shipping companies staff."

Then the final thing is : " Captains of the ships are requested " to bring the above to the notice of the crew."

It is that telegram that Mr. Dabkowski recorded on the next day in his memorandum of the interview as having been agreed between them and the minister and it is upon that agreement (a term which I use for the moment as a neutral term) that the plaintiffs in the present action rely.

[His Lordship then referred to the objection of Mr. Plinius to send to all the masters of Polish ships the telegram which the minister had dictated and continued :] but the fact remains that Mr. Plinius of the defendant company did send the telegram of the minister, albeit the minister met the cost, to every master of every ship with which he was able to get into touch and through Mr. Plinius and through the defendant company the information of this agreement or this offer or this obligation was brought to the notice of the crews of all the ships under the control of the Gdynia-Ameryka Linie.

On July 5 a document was sent by the minister to Mr. Plinius in which he formally directed Mr. Plinius to pay this gratuity in accordance with the resolution and it was to be paid to masters, officers and crews of the ships managed and operated by the defendant company and indeed by the other two companies which were administered together with the defendant company.

So far I am satisfied on these facts, first that Mr. Kwapinski, the Minister, entered into, and intended to enter into, an obligation on behalf of the defendant company to pay this gratuity ; secondly, that he communicated that intention to Mr. Dabkowski and Mr. Fligiel on behalf of their unions ; thirdly, that they there and then accepted that offer or obligation ; fourthly, that Mr. Kwapinski, the minister, did it purporting to act on behalf of the company under the Act of March 30, 1939. Further, I am satisfied, on the facts, as indeed is quite plain, that he intended and arranged that notice of this offer or obligation or agreement should be sent to all crews, so that the men should know about it and be able to act upon it, and that, although it is true that the ministry paid for it, the defendant company, through Mr. Plinius, sent the information to all these ships.

I want to say a word about the position of the two plaintiffs in this action. The facts, as I understand them, and as I find them, are that the first plaintiff, Mr. Boguslawski, was a second engineer on a ship called the *Morska Wola*, and was a Polish officer. I say that because a question did arise as to the meaning of the words "Polish crews." I confess that I do not find a great deal of difficulty in coming to the conclusion that that meant the crews of Polish nationality, especially when it is reinforced by the use of the word "homeland," which I think could refer only to "Poles," as we understand that word.

He had been on the *Morska Wola*, apparently, on three different occasions since 1939, and served from August, 1943, until July 5, 1945 as second engineer. On July 5 he was on the ship at Salford, near Manchester, and on that date a telegram was read out, not by the captain but by the chief officer, because the captain was away; and thus Mr. Boguslawski on that day was told that if he felt compelled to leave the ship he would be entitled to this three months' compensation.

I think I am right in my recollection that "three months" was not, first of all, in the telegram, but it was a telegram saying "suitable compensation," but Mr. Boguslawski asked the first officer then, and on the next day he asked the captain what "compensation" meant, and was told in fact that it was to be three months. On July 7, Mr. Boguslawski, having these matters in mind, left the ship. He had his seaman's book duly signed by the captain, and he claims his three months' gratuity accordingly.

Mr. Krupka, the other plaintiff, was a seaman carpenter. He had served, anyhow from 1934, or it may be earlier, on Polish ships, and he also was a Polish citizen. I think he was not on the *Morska Wola* on July 3, but he joined it, I suppose from the pool, on July 4, and he heard the telegram read out on July 6, which, if he is right about his dates—I do not think it really matters—was the day after it had been read to the officers of the ship, and he was told by the captain that the compensation was three months' compensation.

Then on July 7, Mr. Krupka, having heard of this, having made up his mind that he was going to leave the ship, left the ship, and I think he had his book also signed, and he claims his three months' compensation in those circumstances.

The main points taken for the defence are, first, that the minister had no power to make this contract at all; secondly, that if he did make it it was a collective agreement, and under Polish law should have been in writing; thirdly, that the trade union officials had no right or authority to enter into whatever it was they did enter into on behalf of their members;

fourthly, that if it was merely a unilateral obligation it was unenforceable as against the company; fifthly, that, if it is argued (as of course it is) that the men ratified the action of the trade union officials by leaving their ships, they had no power to ratify such an arrangement; sixthly, that at the most this arrangement of July 3 was what in Polish law is called a "donation," and that a donation must be in a special form, what is called "notarial form," and that plainly this arrangement was not in that proper form. I think those are the points arising on Polish law.

There is another point, which has nothing to do with Polish law, and that is this, that when the British Government recognized the new Polish Government in July, that recognition dated back to June 28, when the Government was set up, and therefore, of course, quite plainly Mr. Kwapinski had no power at all to enter into this agreement, because he was no longer an effective minister in an effective government of Poland. I think, that with certain ramifications, those are the points which have to be decided.

I have been told that a similar action, based on these facts, has already been tried in these courts, and indeed Mr. Linton Thorp read to me in his opening, or I almost said as his opening, the judgment of Croom-Johnson J. in that case.

It is right to say that when one is dealing with matters of foreign law, those matters are matters of fact, and therefore the decision of a court in this country on those matters of Polish law does not in the least bind the court in another action on the same questions. I was told in evidence that the witnesses who failed to satisfy Croom-Johnson J. for the defendants have been replaced by a new team, in the hope that they would satisfy me. This may be a somewhat inconvenient method, and if it means that some sixty actions on these same facts are going to be tried in these courts, no doubt somebody will think of a solution to avoid an almost interminable waste of judicial time.

None the less, that is the law of this country, and the findings of another judge in another case, even though based on these facts, do not in the least bind me; and I hope that I have exercised in this case, whatever the result be, my own independent judgment. If I may say so, if there are other actions of a similar kind, I hope that people will be sensible enough, having tested these matters, it may be, in a higher court, to accept the decisions and to act accordingly; but that is a matter for them.

[His Lordship then dealt with the first six points which he had mentioned and which depended upon the proper construction of Polish law, and he found for the plaintiffs on all those points. He then dealt with the point of retroactivity with which alone this report is concerned.]

A number of cases have been cited to me, and I think the result of them is this: that when this country recognizes a government of a foreign country as being the government, the recognition dates back to the time when that government became the effective de facto government. In the case of *Aksionairnoye Obshestvo A. M. Luther* v. *James Sagor & Co.* (1) our Foreign Office said in their certificate: "We recognize "the Soviet Government as the government of Russia." They were asked for more details, and they said: "Well, "we recognized originally the Provisional Government, which "was the Kerenski Government. In 1917 that government "was displaced by what is now called the Soviet Government."

It was held on those statements of fact from the Foreign Office that the recognition dated back to 1917 or thereabouts; in other words, to the time when the government which was recognized became over Russia the effective de facto government. I think the general principle is just that, that when we recognize a foreign government we recognize it back to the time when it became, over the area concerned, the effective government, and it follows from that that we recognize the acts which it has carried out in the whole of that period.

In this case there are some unusual features. We are dealing with the government of Poland which was effective in this country and over Polish ships and Polish seamen, and as far as I know no one suggests that up to midnight on July 5, what I call the new government, the Lublin Government, had any control whatever over Polish ships and Polish seamen, because they were all far removed from any area, whatever it was, over which on June 28 the new Lublin Government exercised authority.

Therefore, when our Government recognizes as from a precise hour, namely, midnight on July 5, the new Lublin Government, as far as Polish ships or Polish seamen or the Gdynia-Ameryka Linie with its headquarters in London, are concerned, there is no time when any authority over those was ever exercised by the new government. On the contrary, right up to midnight on July 5, the only government which this country recognized and the only government which in fact had any control over ships and shipping, and the seamen with whom we are concerned, was the old government which came from Warsaw to Angers and to London.

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(1) [1921] 3 K. B. 532.

I was told that the certificate which was given to me in this case is in an unusual form. I do not think it is the practice with regard to certificates of this kind hitherto to set the precise date and hour at which the new government is recognized. Be that so or not, I think it is unusual. I think it was said it is unique to set the limits of the recognition of two governments.

This certificate says that up to midnight on July 5/6, we, the British Government, recognize the Warsaw-Angers-London Government as the government of Poland for the Polish people, and, in particular, of course, the government of the ships, the seamen and the shipping company. As from that midnight we are recognizing another government.

If this be the new form, it seems to me, if I may say so with the utmost respect, that it is a very commendable form, because I should have thought it settled the problem. It is quite true that the Secretary of State for Foreign Affairs, most properly and wisely no doubt, says at the end of his certificate that the question of any retroactive effect of this recognition is a matter to be decided by the courts.

I should have thought and I so hold—there being no authority on this that I know at all—that where the government of this country in terms certifies that it recognizes one government up to midnight on July 5/6, and another government thereafter, the acts done by that government recognized up to midnight in this country while it was still recognized as the government, must be valid. Otherwise this certificate would seem to mean little or nothing. And I think if that is so, there can be no retroactive effect back, for example, to June 28 as is pleaded in this case.

I hope it will not seem to anyone in this case or to other courts that I am dealing with this very important question rather summarily. I am not, but I say so far as I know and so far as counsel know, there is no authority on it at all. We all understand how recognition normally dates back to the time when the government is the de facto government; but this is something quite different and I say with great respect that I should have thought it was really very clear that if the Foreign Secretary's certificate, on which alone I have to decide, says in terms, "We recognize one government up to such a time "and another after it," it means what it says.

I think it can have in this country no retroactive effect at all, and therefore on July 3, Mr. Kwapinski was still the Minister of Industry, Shipping and Commerce in a legally recognized government, and therefore could exercise whatever powers he had in that capacity.

There will be judgment for the plaintiffs for the amounts which they have claimed.

Judgment for the plaintiffs.

Solicitors for the plaintiffs: *Hilder, Thompson & Dunn.*
Solicitors for the defendants: *Constant & Constant.*

MOAT *v.* MARTIN AND ANOTHER.

C. A.
1949
Oct. 17.
Evershed M.R., Denning L.J. and Hodson J.

Landlord and tenant—Covenant not to assign without the landlord's consent—Provision that "such consent will not be withheld in the case of a respectable and responsible person"—The word "unreasonably" not to be read in—Landlord and Tenant Act, 1927 (17 & 18 *Geo.* 5, *c.* 36), *s.* 19 *sub-s.* 1.

In a tenancy agreement the tenant entered into a covenant with the landlord "not to assign underlet or part with possession "of the demised premises or any part thereof without the consent "in writing of the landlord such consent will not be withheld "in the case of a respectable and responsible person." Where, therefore, the tenant applied for leave to assign to a person who was respectable and responsible, it was not open to the landlord to withhold consent and the Landlord and Tenant Act, 1927, s. 19 sub-s. 1 (*a*), could not be applied to the latter part of the covenant to make it read "such consent will not be unreasonably "withheld in the case of a respectable and responsible person."

APPEAL from West London county court.

By an agreement dated February 28, 1947, the plaintiff, Claude Moat, demised to the first defendant, Major J. H. S. Martin, a flat on the fourth floor of 23, Cornwall Gardens Court, Cornwall Gardens, for the term of two years from March 25, 1947, at the rent of 110*l.* per annum payable quarterly in advance, the landlord paying all rates and taxes. The rateable value was under 100*l.* A covenant entered into by the first defendant as tenant was "not to assign underlet "or part with possession of the demised premises or any "part thereof without the consent in writing of the landlord such consent will not be withheld in the case of "a respectable and responsible person . . . ." In March, 1948, the first defendant sub-let the property for the residue of the term but the sub-tenancy was surrendered in the same year and on January 1, 1949, the first defendant by his solicitors applied to the plaintiff for leave to assign the remainder of the tenancy to the second defendant, a Mr. Thom. Mr. Thom was admittedly a respectable and responsible person but on January 5, 1949, the estate manager wrote to the solicitors stating that the plaintiff refused leave but offered to accept an immediate surrender of the premises. On January 13, 1949, the first defendant's solicitors replied submitting that the refusal was unreasonable and on February 25, 1949, they informed the estate manager that the first defendant had executed an assignment in favour of the second defendant.

On March 21, 1949, the plaintiff commenced proceedings against both defendants in the county court for possession of the premises on the ground that the first defendant had assigned the demised premises to the second defendant in breach of covenant. Both defendants set up the defence that consent to this assignment had been wrongfully withheld seeing that the second defendant was a respectable and responsible person.

The county court judge held having regard to s. 19 sub-s. 1, of the Landlord and Tenant Act, 1927 (1), that the word "unreasonably" must be read into the latter part of the covenant not to assign without leave so that it read "such "consent will not be unreasonably withheld in the case of "a respectable and responsible person." But he held, applying *Swanson* v. *Forton* (2) that the consent was in this case unreasonably withheld seeing that the new tenant would only have the same right to hold over as a statutory tenant under the Rent Restriction Acts at the termination of the tenancy that the existing tenant had had. The plaintiff appealed.

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(1) Landlord and Tenant Act, 1927, s. 19 sub-s. 1: "In all "leases whether made before or "after the commencement of this "Act containing a covenant, "condition or agreement against "assigning . . . . without licence "or consent, such covenant, "condition or agreement shall "notwithstanding any express "condition to the contrary, be "deemed to be subject—(*a*) to "a proviso to the effect that "such licence or consent is not "to be unreasonably with-"held . . . ."

(2) [1949] Ch. 143.

Heathcote-Williams K.C. and *P. Freeman* for the plaintiff. It was unreasonable that the plaintiff should be asked to assent to an assignment only a few weeks before the end of the term with the result that the assignee could hold over as a statutory tenant under the Rent Restriction Acts. On this argument *Lea* v. *K. Carter Ld.* (1) and *Swanson* v. *Forton* (2) must be considered. It is said, however, that under the terms of the covenant against assignment, leave to assign cannot be refused in the case of a respectable and responsible person. But on that question the Landlord and Tenant Act, 1927, s. 19 sub-s. 1, is material and applies to make that part of the covenant read as : " such consent will not be unreasonably " withheld in the case of a respectable and responsible person." It is contended that the county court judge was wrong in holding that the consent here was unreasonably withheld.

[EVERSHED M.R. The effect of the assignment was not to confer a right to hold over which the tenant did not possess.]

The assignment here was a device to keep on foot a statutory tenancy that the tenant would not himself wish to make use of.

[EVERSHED M.R. A certain class of assignee was expressly made one as to whom consent could not be refused. Section 19 sub-s. 1, of the Act has no application in such a case.]

It is true that s. 19 sub-s. 1, usually operates in favour of the tenant but there is no express provision to this effect and there is no reason why it should not here operate in favour of the landlord.

[The court being against the appeal on this preliminary point, no further point was argued.]

J. P. Hunter-Brown for the defendants was not called upon.

EVERSHED M.R. This is an appeal by a landlord who sought in the action to recover possession of certain premises in Cornwall Gardens, London, as on a forfeiture for breach of contract by the tenant. The learned judge in the court below came to the conclusion that there had been no breach of contract and on that account dismissed the action. The breach of contract alleged was an assignment by the tenant, Major Martin, who is the first defendant, to the second defendant, Mr. Thom, without having previously obtained the written consent of Mr. Moat, the plaintiff landlord. When the case was opened it appeared that the main question which the appellant, through Mr. Heathcote-Williams, desired to put before this court was a question of the same kind as that which recently came before this court in the two cases of *Swanson* v. *Forton* (1) and *Lea* v. *K. Carter Ld.* (2), being a question whether, having regard to the then remaining period unexpired of the original term, and the other circumstances of the case, including the proper inference to be drawn as to the tenant's intention himself to go on residing on the premises, it was unreasonable for the landlord to withhold his consent when by so doing he would prevent another person than the existing tenant enjoying after expiry of the term the privileges of the Rent Acts. As I have indicated the learned judge came to the conclusion that there was here an unreasonable refusal by the landlord, distinguishing this case from the two cases to which I have alluded. It must not be assumed from anything that I say or have said that I think the learned judge was wrong in his conclusion, but as it has turned out it has been unnecessary for this court to consider that matter.

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(1) [1949] 1 K. B. 85.

(2) [1949] Ch. 143.

A preliminary point has arisen on which the learned judge concluded in favour of the plaintiff. As he observed, if the preliminary point was to be decided the other way the plaintiff, to use his own phrase, was out of court. The preliminary point arises because the provision against assignment, which is, of course, a very common provision in tenancies, is in this case in an unusual form. I will read it. It is para. 7 of the part of the agreement following the opening provision "The "tenant agrees with the landlord as follows": "Not to "assign underlet or part with the possession of the demised "premises or any part thereof without the consent in writing "of the landlord such consent will not be withheld in the case "of a respectable and responsible person . . . ." All persons conversant with this type of case will appreciate that the formula which I have read departs from the more usual provision, one might almost say the common form provision, which, making perhaps a virtue of necessity, follows the terms of the Landlord and Tenant Act, 1927, by saying "such "consent not to be unreasonably withheld in the case of a "respectable and responsible person." Here the provision is much more positive in the tenant's favour, "such consent

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(1) [1949] Ch. 143.

(2) [1949] 1 K. B. 85.

"will not be withheld." The point was taken in the court below that since Mr. Thom is by universal admission both respectable and responsible the landlord has debarred himself in any event from withholding his consent. The learned judge. however, came to the conclusion that a proper reading of s. 19 sub-s. 1, of the Landlord and Tenant Act, 1927, compelled him to qualify the apparently absolute obligation on the landlord not to withhold his consent by inserting after the words "will not be" and before the word "withheld" the word "unreasonably." With all respect to the learned judge I do not think he was right in taking that view. It would indeed be rather surprising if that result were the right one, for one cannot properly lose sight of the fact that the purpose of this part of the Landlord and Tenant Act, 1927, was to relieve tenants in certain respects and on certain conditions from the full strictness of their obligations. Section 19 on the face of it obviously is intended, or at any rate intended primarily, to relieve the tenant from the result of arbitrary refusal by the landlord to give consent to assignment by requiring that consent to be subjected to the proviso that it will not be unreasonably withheld. The learned judge came to the conclusion that though no doubt that was the primary intention of the section, nevertheless it did not in terms say that it only operated for the tenant's benefit: and, therefore, that if in particular cases it operated the other way, well, that could not be helped.

My view is that properly construed there is in this case no real room for the application of this section at all. It is obvious that the paragraph in the tenancy agreement which I have read may be construed in two ways. You may say, on the one hand that the words "such consent will not be withheld" etc., amount to an affirmative, positive covenant by the landlord not to withhold consent in the case of a proposed assignment to certain categories of people. Alternatively, you may say that the effect of the words "such consent will not be "withheld" does not impose a positive obligation or covenant on the landlord, but cuts down the tenant's obligation so as to make it inapplicable in the case of a proposed assignment to a respectable and responsible person. In other words, in the case of an assignment to a respectable and responsible person there is on the true construction of this tenancy no covenant by the tenant not to assign without consent.

Since *Treloar* v. *Bigge* [1], in the ordinary case where the covenant is qualified by words such as "such consent not to "be unreasonably withheld" the effect is not to impose a countervailing obligation on the landlord but to limit or curtail the tenant's obligation under his covenant. In the present case there is, as I have said, a very unusual formula and it might be thought to be an exception to the general rule; but I think it unnecessary to express a conclusion one way or the other because in either event as it seems to me, s. 19 is inapplicable. Section 19 sub-s. 1, reading it briefly and only using the words which apply in this particular case says: "In all leases . . . . . containing a covenant . . . . against "assigning . . . . without . . . . consent, such covenant . . . . "shall, notwithstanding any express provision to the contrary, "be deemed to be subject . . . . to a proviso to the effect "that such . . . . consent is not to be unreasonably with-"held." The first thing to be noticed about the sub-section is that it applies only in cases where there is a covenant against assignment without consent. If the true view is that in this case the covenant against assignment does not apply at all in the case of assignment to a responsible person then there is, so far as this case is concerned, no covenant at all which binds the tenant, and, therefore, nothing in respect of which s. 19 can come into play. On the other hand, if there is a countervailing covenant that the landlord will not withhold his consent in certain circumstances then that countervailing covenant is not a covenant against assignment. On that view there is no ground for reading into a covenant by the landlord not to withhold consent a proviso which is only required by the section to be inserted in a covenant by a tenant against assignment without consent.

I need not pursue the matter. I think there would be other and formidable difficulties in so construing s. 19 as to require one to introduce, in favour of the landlord, the word "unreasonably" into the covenant. The result in my judgment is, with all respect to the learned judge, that this preliminary point is fatal in the circumstances of this case (Mr. Thom being admittedly a person who is respectable and responsible) to the landlord's contention. For reasons best known to himself he chose to enter into a covenant in which he said quite positively and clearly that in certain cases, namely in the cases of assignment to respectable and responsible persons, no consent was required or (which comes to the same thing) that he would not in any circumstances withhold his consent. Having said so much I see no reason whatever why he should not now comply with the terms of the bargain he made. The result is, in my view, that on this point the appeal must fail. I am not as I have said expressing any view on the points on which the learned judge decided in the defendant's favour and on which it is unnecessary in the circumstances for us to hear argument.

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[1] (1874) L. R. 9 Ex. 151.

DENNING L.J. Under this covenant I take it to be clear that the tenant would in the case of any proposed assignment have to ask for the landlord's consent. To that extent therefore it is a covenant not to assign without consent within the opening words of s. 19. But in this covenant there is a provision that such consent will not be withheld in the case of a respectable and responsible person. That provision is not "to the contrary" of a proviso that the consent is not to be unreasonably withheld. It supports it and goes beyond it. The provision is therefore not negatived by s. 19 sub-s. 1 (*a*), for that only negatives provisions "to the contrary", which this is not. I agree, therefore, that this appeal should be dismissed.

HODSON J. The county court judge's first impression was that the agreement which the parties had made was to be given its natural and ordinary meaning and that in those circumstances the plaintiff was out of court. That, I think, is really the correct view. The provision in this particular case is that the consent to assign will not be withheld at all, the circumstances of the case being that the proposed assignee is admittedly a responsible and respectable person. There is, therefore, no room to inquire whether the consent is being withheld reasonably or unreasonably. In my judgment s. 19 sub-s. 1, of the Landlord and Tenant Act, 1927, does not apply and I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Maddisons and Lambs; Bannehr, Son and Macmin.*

H. C. G.

C. A.

1949
Oct. 18, 19.

Evershed M.R.,
Denning L.J.
and
Hodson J.

WOODSIDE HOUSE (WIMBLEDON) LD. *v.* HUTCHINSON.

Landlord and tenant—Rent restriction—Dwelling-house let at inclusive rent—Landlord transfers liability for rates to tenant—"Corresponding "reduction" in rent—Method of calculation—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 3.

Where a tenant of a dwelling-house subject to the provisions of the Rent Restriction Acts is paying an inclusive rent, the landlord paying the rates in respect of the premises, if the landlord transfers the liability to pay rates to the tenant, in order to avoid an illegal increase in rent a "corresponding" reduction in rent must be made in accordance with the provisions of s. 2, sub-s. 3, of the Increase of Rent and Interest (Restrictions) Act, 1920. Such "corresponding reduction" is effected by reducing the rent by a sum equivalent to the liability for rates as it stands at the date of transfer. Thereafter the tenant will bear the burden of any increase in rates and enjoy the benefit of any reduction. If at the date of the transfer of the liability to pay rates to the tenant the landlord has not served valid notices in accordance with the powers conferred on him by the Acts to increase the rent by the amount of past increases in rates, he may, after such transfer, by proper demand increase the rent to the extent requisite to bring the rent up to the standard rent which will be reduced by an amount equivalent to the rates as they stood when the standard rent was fixed. Such demand, though not required to be in the form of a statutory notice of increase of rent, must contain substantially the same information, showing the grounds of the increase.

APPEAL from Kingston-on-Thames county court.

By a tenancy agreement dated March 4, 1942, Woodside House (Wimbledon) Ld. let a flat, No. 15, Woodside House, Wimbledon, to Henry Grafton Hutchinson for a term of three years from January 1, 1942, at an annual rent of 180*l.*, the landlords undertaking to pay both the general and water rates. After the expiration of the tenancy the tenant continued in occupation as statutory tenant. It was agreed that the standard rent of the premises was 190*l.* per annum. The rates payable in respect of the premises on September 1, 1939, the date when the standard rent was determined, amounted to 41*l.* 2*s.* 0*d.* In fact the landlords had never increased the rent to 190*l.* nor had they increased the rent by the amount by which the rates payable in respect of the premises had been increased from time to time. The landlords transferred the liability to pay the rates to the tenant by a letter dated

September 22, 1946, addressed to the tenant in the following terms: " Dear Sir, As from October 1 we shall be pleased " if you will kindly pay the following net amount of rent " per month instead of as at present. We feel that this will " be mutually more convenient for you to pay this way as " the rates are likely to fluctuate from year to year. Arrange- " ments will be made whereby the council and the water " board will make their own collection." Then in the left hand bottom corner of the letter appeared the following: " Monthly 13*l.* 8*s.* 0*d.*" equivalent to a total of 160*l.* 16*s.* 0*d.* The tenant agreed to the transfer of the liability to pay rates.

It was conceded that the future rent which the tenant was required to pay by the letter of September 22, 1946, was wrongly calculated. At that date the rates payable in respect of the premises were 61*l.* 4*s.* 7*d.*

In these proceedings the landlords claimed possession and certain arrears of rent. The question at issue was how the amount of the rent payable by the tenant after the transfer to the liability to pay rates should be calculated. The county court judge held that the reduction in rent to be made under s. 2, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1) in respect of the transfer of the burden of rates from the landlords to the tenant should correspond with the actual rates from time to time payable by the tenant.

The landlords appealed.

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2, sub-s. 3: " Any " transfer to a tenant of any " burden or liability previously " borne by the landlord shall, " for the purposes of this Act, " be treated as an alteration of " rent, and where, as the result " of such a transfer, the terms " on which a dwelling-house is " held are on the whole less " favourable to the tenant than " the previous terms, the rent " shall be deemed to be increased, " whether or not the sum periodi- " cally payable by way of rent is " increased, and any increase of " rent in respect of any transfer " to a landlord of any burden or " liability previously borne by the " tenant where, as the result of " such transfer, the terms on " which any dwelling-house is held " are on the whole not less " favourable to the tenant than " the previous terms, shall be " deemed not to be an increase " of rent for the purposes of this " Act: Provided that, for the " purposes of this section, the " rent shall not be deemed to be " increased where the liability for " rates is transferred from the " landlord to the tenant, if a " corresponding reduction is made " in the rent."

C. A.

1949

Woodside House (Wimbledon) Ld. v. Hutchinson.

L. A. Blundell for the landlords. The judge misdirected himself in point of law as to the true construction of s. 2, sub-s. 3, of the Act of 1920. The question is what is the correct method of calculating the future rent payable by the tenant after the liability to pay the rates has been transferred from the landlords to the tenant. It is contended that the result of such a transfer should be that the landlords will thereafter receive the rent which was the standard rent: *Seaford Court Estates Ld.* v. *Asher* (1).

When a tenant becomes a statutory tenant he becomes liable to pay the standard rent, which comprises two elements: rent and rates. He is liable to pay all future increases in the amount of the rates payable if the landlord puts the machinery of the Act in motion. The landlords first contention is that the statutory rent is the actual rent plus permitted increases and to ascertain the future rent payable by the tenant after the liability to pay rates has been transferred to him there must be first added to the actual rent all permitted increases for rates and then from that total the actual rates payable at the date of transfer should be deducted. The landlords should not be prejudiced by reason of the fact that they did not in fact increase the rent by the amount of past increases in rates. The liability of the tenant and not the rent actually paid should be the basis of calculation. Secondly, it is submitted that s. 2, sub-s. 3, should be looked at as a whole. The rent is to be deemed to be increased when the terms on which the premises are held are less favourable to the tenant than they were before. Here if the landlords method of calculation is correct, the tenant will not be in a worse position than he would have been in if the landlord had insisted on their full rights under the Acts. Scott L.J. in his judgment in *Winchester Court Ld.* v. *Miller* (2) shows that the principle underlying s. 2, sub-s. 3, is that the equilibrium of liabilities as between a landlord and tenant is not to be affected. The proviso to sub-s. 3 does not introduce a new principle in respect of rates. It is submitted that "corresponding" does not mean "equal." "Rent" in the proviso means the statutory rent which a tenant could lawfully have been required to pay. "Corresponding reduction" means such an adjustment of the rent as will preserve the equilibrium having regard to the future liability of the tenant to pay rates. The county court judge has held that "correspond" means

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(1) [1949] 2 K. B. 481.

(2) [1944] K. B. 734.

"equal to the amount of the rates payable from time to time." If this construction were right, it would mean that if at any time in the future the rates went up, the landlords would have to bear the burden of the increase without any power of serving any notice of increase. The principle of the Act is that the landlord is to get the 1939 net rent and the rates are to fall on the tenant. The liability to pay rates is the one burden that a landlord can pass on to the tenant. A statutory tenant is under a legal obligation to pay whatever is the statutory rent.

Neil Lawson for the tenant. It is clear from the language of s. 3, sub-s. 2, of the Act of 1920 that a tenant is under no liability to pay the amount of any increase in rates until a proper notice has been served on him. He is not under a contingent liability to pay an increased rent. There is only the possibility of an increase on a contingency. This is a different case to that where a tenant has broken a covenant in his lease, when he is under a contingent liability. Where rates are increased there is no actual liability until a notice of increase is served. The quantum of the burden for rates at the date of transfer must be ascertained and that is the burden which must be transferred to the tenant. Where the liability for rates is transferred to the tenant there is deemed to be an increase in rent as the terms of the letting then become less favourable to the tenant. That increase in rent is an illegal increase and can only be justified if the landlord shows that he has made a "corresponding" reduction in the rent. Therefore the reduction in the rent must be a reduction in rent equivalent to the rates then payable by the landlord. Before a landlord can increase the rent, he must serve a notice showing how the increase is authorized. Here the landlords never served such a notice. Accordingly, when the burden of rates was transferred the standard rent was 190*l.* From that must be deducted the sum of 61*l.*, the rates payable when the burden was transferred, leaving the rent payable by the tenant at 129*l.*

L. A. Blundell in reply. Where a landlord is transferring the burden of rates to a tenant, there is no need for him first to serve a notice of increase in respect of any past increase of rates. All that the landlords were asking here was to be paid the net rent as at September 1, 1939, that is 190*l.* less the rates then payable of 41*l.* making the future rent payable by the tenant 149*l.*

C. A.
1949

Woodside House (Wimbledon) Ld. v. Hutchinson.

Evershed M.R. This appeal has raised another question under the Rent Restriction legislation which, perhaps surprisingly, has not come before the courts before, the question being under the provisions of sub-s. 3 of s. 2 of the Act of 1920 what is meant by the phrase " a corresponding reduction."

The case is very peculiar, and it may well be that the point has not arisen before, and will not arise in the future, because the mistakes of those who set to work to make the calculations in regard to the amount of rates payable from time to time in respect of the flat here in question led them unhappily to arrive almost without exception at erroneous conclusions. Further, the landlords who attempted to serve notices for permitted increases in the rent, again failed to observe the appropriate forms which have to be followed, so that no permitted increases had successfully been added to the standard rent when the dispute between the parties which is now before the court arose.

The case relates to a flat, No. 15, Woodside House, Wimbledon, of which the tenant is a Mr. Hutchinson, and he has been the tenant at all material times. Originally in the year 1942 there was a contract of tenancy for three years. The contractual rent was 180*l.* per annum, and the landlords undertook to pay the rates—that is both the general rate and the water rate. That tenancy expired in June, 1945, and since that date Mr. Hutchinson has remained in possession and has enjoyed the privileges of what is known as a statutory tenant. It is conceded in this court that, although the contractual rent under the tenancy was 180*l.* per annum, the standard rent for the purposes of the Act, which had to be fixed in relation to the year 1939, was and is 190*l.* per annum. What has happened in this case, apart from these ineffective attempts to increase the rent and the various arithmetical problems in which the parties have engaged themselves for some considerable time, is that in October, 1946, the landlords transferred to the tenant the burden of paying the rates which they, the landlords, had hitherto undertaken and discharged. The amount of the rates—and when I use that word I shall be understood to include both the general rate and the water rate—payable in respect of this flat at the time when the standard rent had to be arrived at, to wit, in 1939, was a sum which for simplicity, and so as to avoid involving myself unnecessarily in figures, I will take at the figure of 41*l.* 2*s.* 0*d.* I think that is in fact substantially accurate, and it will suffice for the present judgment. It appears that as a result of variations both in the poundage and in the valuation the amount of rates payable in respect of this flat from 1939 to 1946 first of all fell and then rose, and rose substantially beyond the figure at which they stood in 1939. So that when we arrive at the date when the transfer was made effective, the total of the rates then payable in respect of the flat was 61*l*. 4*s*. 7*d*., an increase of approximately 20*l*.

The notice to the tenant of the proposed transfer is contained in a letter of September 2, 1946. [His Lordship read the letter.] It is plain now and conceded that on no view was the rent claimed in that letter right; but the letter at least made it clear that from October 1, 1946, the tenant would pay the rates as demanded from time to time, and that the amount which the landlord, demanded for rent was to be adjusted in some way. The question of principle, and the main question argued in this court, has been, in what way?

As I have already said, and I will simplify my figures still further, the rates in respect of the flat at the date when the standard rent was fixed were 41*l*. and at the date when the transfer took place 20*l*. more, 61*l*. It is the argument of the landlords that under the appropriate sub-section you deduct from the rent then payable the amount of the rates as they stood when the standard rent was fixed. I will explain and develop that argument hereafter, but that has been the contention. The result would be to leave a net rent payable to the landlords of 149*l*. per annum.

On the other side, Mr. Lawson has argued primarily that the amount of the "corresponding reduction," to use the formula in the sub-section, is the actual amount of the rates payable in respect of the flat at the date when the transfer of the obligation was effected, i.e., 61*l*. which would leave not 149*l*. but 129*l*. only payable to the landlords by way of rent. On either view the tenant would thereafter suffer if the rates were increased, for the landlords would no longer be concerned with them. If the rates fell the tenant would get the benefit, but the rent would remain at the figure either of 149*l*. or of 129*l*., and it would not be liable to further variation in accordance with any variation thereafter of the amount of the rates. There was, however, a third view which Mr. Lawson took, I gather, somewhat lightly in the court below, and has taken

C. A.

1949

Woodside House (Wimbledon) Ld. v. Hutchinson.

Evershed M.R.

even more lightly in this court, but which did commend itself to the learned county court judge. That was this, that the sub-section does not contemplate a single "corresponding "reduction" of the rent which is then fixed for all time thereafter but contemplates a sort of sliding scale; and you have to look, according to this view, each year at the amount of the rates in fact leviable and then make your adjustment, always so that the net adjusted rent, plus the actual rates for that year, come to 190*l.* The effect of that view, which would be administratively highly inconvenient, would be of all the ways most disadvantageous for the landlords, for the tenant would in effect be in the position of paying in all circumstances, whatever happened to the rates, 190*l.* all told for rent and rates. If the rates went up the tenant would not be further out of pocket, but by a side wind the landlords would suffer the loss. If the rates went down, it is true the landlords on this view would get rather more rent, but, in the circumstances as they are, the more probable contingency, namely, increases in the rates, would damnify the landlord who would have no means whatever, as I follow it, of serving any notice of increase, or otherwise recouping himself.

The point is, as I say, not by any means free from serious difficulty, and it has arisen in the circumstances of this case, circumstances which are very special. I hope I am not in any way being disrespectful to the learned county court judge in saying that for my part I cannot accept his view of the operation of this section. For reasons which I have already indicated it would be inconvenient, and I think unjust. Nor does it seem to me that the language of the sub-section requires or justifies such a conclusion.

Mr. Blundell contended that when regard is had to the actual proposed rent adjustment, it cannot be said in this case that the terms on which the dwelling-house has been held after the transfer was made were on the whole less favourable to the tenant than the previous terms, and that, therefore, we need not concern ourselves with the proviso at all. I cannot accept that. It seems to me that the transfer of the burden of rates, which might well go up, to the tenant, allowing for whatever adjustment was suggested by the landlords in regard to rent, and assuming in Mr. Blundell's favour that the "terms" should include the amount of the rent, still left them on the whole less favourable. It becomes necessary, therefore, in order to save the landlords from the illegality which might otherwise ensue, to have regard to the proviso, and to find a reduction made in the rent corresponding, and I am paraphrasing the language somewhat, to the liability for rates which is transferred from the landlords to the tenant; for that I think is the meaning of the proviso. Mr. Blundell (and this was his main argument) has suggested that "corresponding reduction" ought to carry one back to the original fixing of the standard rent, and that what is contemplated is that the so-called equilibrium which was established when the standard rent was originally agreed between the parties should be preserved or restored. Expressing it a little more precisely in reference to this case, the figure of 190*l.* was the sum arrived at between two parties under their contract and was arrived at after bringing into account various considerations, all the benefits and advantages of one kind and another, and allowing for the circumstance that the landlords were under an obligation to pay out for rates the sum then standing at 41*l.* Mr. Blundell says you will only achieve the preservation of that equilibrium if you make now such an adjustment in the rent that the landlords will be left, after disembarrassing themselves of the obligation to pay rates, with the same amount in pocket as they originally had, representing the consideration for the other and remaining advantages that the tenant will continue to enjoy. That, I hope, fairly expresses it. He says that if what was intended by this paragraph was a reduction equal to or equivalent to the amount of the rates at the time of the transfer, Parliament would have said that and would have used the words "equivalent to" and not the word "corresponding." In my judgment that argument, attractive though it is, and it was attractively put forward by Mr. Blundell, is not justified. It requires, it seems to me, an over-elaboration of what I regard as a perfectly simple piece of English. The word "corresponding" seems to me a proper and suitable word, and one which does away with the necessity for a considerable periphrasis. I think this proviso means, and is perfectly well and simply adapted to express the point, that where you transfer at a particular point of time a burden hitherto borne by a landlord to the tenant, namely, the liability to rates, then you do not get into the difficulties of the sub-section provided you reduce the rent by a sum equivalent to the then existing liability for rates which you are transferring. Instead

C. A.
1949

WOODSIDE HOUSE (WIMBLEDON) LD. v. HUTCHINSON.

Evershed M.R.

of setting out that rather long formula the simple word "corresponding" is inserted.

I therefore read this proviso as meaning plainly and simply this, that when you make a transfer of rates you avoid the unlawful increase of rent by reducing the rent by a sum equivalent to the liability for rates as it then stands. Having done so, it then becomes a matter for the tenant to bear the burden of any increase in rates and enjoy the benefit of any reduction. The landlord is left with a net rent which is thereafter entirely unaffected by rates, and is arrived at by deducting from the rent, that is the rent then payable, the then amount of the rates. Put in arithmetic for the purposes of this case, the result is 190*l.* minus 61*l.* (I am using round figures again).

The result, if that is right, appears to me at first sight to involve a possible hardship on the landlords for this reason: from now on, since they are not paying the rates, it is quite plain they could not serve a notice of increase because of an increase in rates. If the result was that they were then left with a maximum net rent—apart from any other considerations which would entitle them under the other sub-sections to increases—of 129*l.*, then it would appear that they were in the unhappy position of suffering a serious and perpetual loss as a result of their errors in failing to give in proper form the notices of increase which they had attempted to give.

Mr. Lawson has conceded, and if I may be allowed to say so wisely and rightly conceded, that, although it is no longer open to the landlords to serve a notice in standard form increasing the standard rent by reference to increases in rates, it is still under the general terms and intention of the Act open to the landlords, provided they do it in the proper way, to bring up the rent to the standard rent if it has fallen below the standard rent. In the course of the argument examples were given. One was a case where a landlord, an owner of property, allowed some tenant for compassionate reasons to have a flat at a very much smaller rent than the standard rent. In that sort of case, if there was a transfer of the burden of rates, it would be absurd if the result were that the landlord then could never bring up the rent to the standard which would, of course, have to be adjusted in that case as in this, by reason of the fact that the landlord's original liability to pay rates (a liability comprehended in this case in the standard rent figure of 190*l.*) had been transferred to the tenant.

The result, therefore, is, as Mr. Lawson concedes, and as I think follows from the Act, that the landlords are entitled, and always were entitled, provided they did it in the proper way, to say : " We are entitled, without giving any statutory " form of notice, as in other similar cases, to bring up the rent " and ask you to pay an amount equivalent to the standard " rent." The 190*l.* must now be reduced for this purpose by that part of it which represented, when the standard rent was arrived at, the obligation to pay rates. Again, putting it in figures, the 190*l.* standard rent becomes now, for this purpose, a net standard rent of 190*l.* minus 41*l.*, namely, 149*l.* So that, though the operation of transfer, in order to satisfy sub-s. 3 of s. 2, must reduce the rent to 129*l.*, it is open to the landlords on proper steps being taken to bring it up to 149*l.*

That leaves the question which has been somewhat gone into, but perhaps not exhaustively : has that already been done ? Mr. Blundell says that the point is one which Mr. Lawson should have taken, but I cannot accept that view. It seems to me that if the point was to be taken it was for Mr. Blundell to take it below, but in all the circumstances it does not seem to me right or necessary that we should decide it. It is not a point raised in the case or raised on the appeal, and it may be that there are other matters—I gather there is a very rich bundle of correspondence, a perusal of which we have been spared—from which Mr. Blundell may be able to extract exactly the demand he requires. But I would like to express my view on the matter as far as we have heard it. In my judgment, neither the letter of September 2, 1946, nor the subsequent correspondence, contains such a demand. The demand obviously must, though not following any statutory or precise form, make it plain what it is the landlords are demanding. Where, as here, there has been a transfer of burden, namely, rates, it is obviously right that the tenant, who may not in the ordinary way have any knowledge at all of what the rates were when the standard rent was fixed, should be fully informed. He must therefore be given a proper opportunity (by being given the necessary explanation of what the landlord intends) to verify and, if he so desires, to challenge the figures. But over and above all that, the one thing that seems to me absolutely essential in such a demand is that the landlord should make it clear that he is proposing and intending to increase the rent. That is where it seems to me these early letters fall down. Any demand which does

C. A.

1949

Woodside House (Wimbledon) Ld. v. Hutchinson.

Evershed M.R.

not make it reasonably clear what the landlord is intending to do seems to me on the face of it not to be such a demand as fairly answers the sort of description which I have indicated. I say no more than that because, though it has not been done up to now, the landlords can do it tomorrow, and it would not be right, because we have not seen all the documents or heard all the case, for me to say anything which would shut out the landlords from maintaining that they have already done so. It is, however, right that I should put on record the concession which Mr. Lawson has made plainly, and, as I think, rightly, that the landlords can now increase the net rent, which I have stated is 190*l.* minus an appropriate sum for rates at the date when the transfer was made, to the figure which I have already stated of 190*l.* minus the rates as they were in September, 1939, which I think is 148*l.* 18*s.* 0*d.*, within a penny one way or the other.

For these reasons, therefore, I take a different view from that which appealed to the county court judge on the construction of this paragraph, but at the same time I reject the argument of the landlords. I think the main argument which Mr. Lawson has put before us here and which he put forward below is right, and it is for that construction that I myself decide.

Denning L.J. When this flat was let to the tenant, the landlords, by arrangement with the local authority, were paying the rates. In 1945 and 1946 the landlords purported to serve notices of increases of rent on account of increases of rates. Those notices, as it was eventually conceded, were invalid and so were inoperative to increase the rent; but, at a time when the landlords thought they were valid, they made an arrangement with the local authorities whereby the landlords no longer paid the rates and threw the liability on to the tenant. The tenant acquiesced, so that the liability for rates was transferred from the landlords to the tenant. If the landlords had validly increased the rent to the full permitted amount, there is no doubt that the new rent payable after the transfer would be found by deducting the amount of the current rates from the amount of the current rent. But it has been found that the landlords never validly increased the rent, so that only the standard rent of 190*l.* was payable. In those circumstances, it seems to me that the new rent payable immediately after the transfer must be found by deducting the amount of the current rates from the amount of the rent lawfully payable at the time of the transfer, namely, the standard rent. Any other view would enable a landlord to escape from all the requirements relating to notices of increase.

This does not mean that the landlord is confined for ever to the lower rent. Just as, before the transfer, he could have increased the rent by giving valid notices of increase, so also, after the transfer, he can raise it to the amount permitted by the Act, that is, the 1939 rent less the 1939 rates; but he must make a demand which shows that he is raising it to the permitted amount. Although this demand does not require to be in the form of a statutory notice of increase, it must afford substantially the same information. An error or omission due to a bona fide mistake may not defeat the validity of the demand, but that there must be some demand, I have no doubt. In cases where there is no question of transfer, and a landlord wishes to raise a low rent payable by a statutory tenant up to the standard rent, he must clearly make a demand before he has any right to the standard rent; and the demand must show on what ground it is made: so here, after the transfer, there must be a demand for the increase showing on what ground it is being made.

HODSON J. I agree with the construction placed by the Master of the Rolls on sub-s. 3 of s. 2 of the Act of 1920. The construction contended for by the landlords is, in my opinion, a strained construction which it is unnecessary to adopt, and which it would be wrong to adopt. That is really decisive of the question which has been raised and argued on this appeal. It follows that the judgment of the learned county court judge must be varied, in that the construction which he puts on the proviso to the sub-section is rejected by this court. I agree also with the remarks which have fallen from my Lord as to what may happen in the future.

Appeal allowed.

Solicitors: *G. & G. Keith; Edwin Coe & Calder Woods.*

B. A. B.

1949
Oct. 19.

Lord Goddard C.J., Croom-Johnson and Lynskey JJ.

SMITH *v.* MORRIS MOTORS LD. AND HARRIS.

Factories—Dangerous machinery—Definition of "securely fenced"—Factories Act, 1937 (1 *Ed.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14, *sub-s.* 1 ; *s.* 16. *Costs—Appearance of third party on hearing of appeal.*

The respondents, Morris Motors Ld., carried on the trade of manufacturers of motor vehicle parts at a factory occupied by them at Woodstock Road, Oxford. On December 31, 1948 the respondent, Harris (who had been served with a summons by the first respondents under s. 137 of the Factories Act, 1947, charging him with being the actual offender), was engaged in trying out press tools on a power press at the factory. In removing a metal blank from the bed of the press his right hand was caught in the machinery and crushed. The press was fitted with a satisfactory fence, but at the time of the accident the machine was being operated with the fence raised.

The first respondents were charged before a court of summary jurisdiction at Oxford with contravention of s. 14, sub-s. 1, of the Factories Act, 1947, in that the power press, a dangerous piece of machinery, was not securely fenced. The justices held that when the fence was down, the machine was securely fenced; that the mere provision of the fence was enough to satisfy s. 14, since that section did not require, as did s. 16, that the fence should be kept constantly in the down position. The prosecution had chosen to proceed under s. 14 and not s. 16, and accordingly they dismissed the summons against Morris Motors Ld. The summons against Harris was thereupon withdrawn.

Held, dangerous machinery is not securely fenced within the meaning of s. 14 unless the requirements of s. 16 are complied with. Section 16 creates no separate offence and the appellant's information was correctly laid under s. 14.

The "third party," though he must be made a party to the proceedings, need not appear at the hearing of the appeal.

APPEAL by case stated from decision of Court of Summary Jurisdiction held at Oxford, on March 17, 1949, by which the justices dismissed an information preferred by the appellant Smith against Morris Motors Ld., alleging an offence against s. 14, sub-s. 1, of The Factories Act, 1937 (1). A summons issued

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(1) Factories Act, 1937, s. 14, sub-s. 1: "Every dangerous part "of any machinery, other than "prime movers and transmission "machinery, shall be securely "fenced unless it is in such a "position or of such construction "as to be as safe to every person "employed or working on the "premises as it would be if "securely fenced."

Section 16: "All fencing or

[Reported by Mrs. F. N. BUCHER, Barrister-at-Law.]

under s. 137 by Morris Motors Ld. against Harris, charging him with being the actual offender, was thereupon withdrawn.

The justices found the following facts:

The respondents, Morris Motors Ld. carried on the trade of manufacturers of motor vehicle parts at a factory occupied by them at Woodstock Road, Oxford. On December 31, 1948, the respondent Harris, a fully qualified workman employed by Morris Motors Ld., was trying out a power press at the factory. The ram of the press was operated by electric power communicated to the ram by pressing on a foot pedal. Power could not be communicated to the ram unless a clutch release lever was in a position which enabled the clutch to engage. The press was fitted with a satisfactory type of fence. When this fence was down and locked, the clutch release lever was automatically in a position which enabled the clutch to engage when the foot pedal was depressed. When the fence was up, the clutch release lever could be put into a position enabling the clutch to engage only by raising the linkage to the clutch brake. This could be done by hand when the fence was up. When the press was operated with the fence raised there is a risk of injury from contact with the ram.

At the time of the accident, Harris was engaged in trying out press tools for use in the manufacture of components. For this operation the practice was to insert the tool in the ram, place a metal blank in position on the bed of the press, and bring down the ram under pressure upon the blank. It was more convenient to try out the press tools with the fence raised. If they were tried out with the fence down, as was possible and practicable, the blanks could be placed in the correct position on the bed of the press by means of prodders. On December 31 Harris was operating the press with the fence raised. Under his instructions, an assistant raised the linkage by hand to the clutch brake to enable the clutch to engage. One blank was struck off, and Harris then placed

" other safeguards provided in " pursuance of the foregoing " provisions of this Part of this " Act shall be of substantial " construction, and constantly " maintained and kept in position " while the parts required to be " fenced or safeguarded are in " motion or in use, except " when any such parts are necessarily exposed for examination " and for any lubrication " or adjustment shown by such " examination to be immediately " necessary, and all such " conditions as may be specified " in regulations made by the " Secretary of State are complied " with."

his right hand under the ram to remove the blank from the press, when the ram descended under pressure and crushed his hand.

The justices held that the contentions of Morris Motors Ld. were correct, viz., that the press was provided with a fence, and was securely fenced when the fence was down; that in providing the fence Morris Motors Ld. had complied with the requirements of s. 14 of the Factories Act, 1937, which did not require, as did the provisions of s. 16 of the Act, that the fence should be kept constantly in position; and that if there was any offence at all (which was denied) it was against s. 16 and not against s. 14. The justices accordingly dismissed the summons under s. 14 against Morris Motors Ld., who withdrew their summons under s. 137 against the respondent Harris.

B. J. M. MacKenna for the appellant. The stated case makes the facts clear. Undoubtedly there was an efficient fence which could have been used at the time of the accident, but it was not being used.

The justices have misconstrued the Act. The offence was properly charged under s. 14. Section 16 is a definition section, explaining the obligation imposed by s. 14, and in particular stating at what points of time the fence of dangerous machinery must be in position. Section 14 imposes the obligation to keep fenced: s. 16 merely shows the extent of the obligation, that is, it defines the character of fencing which must be used to come within the meaning of s. 14.

It is an offence against s. 14 to have a machine not securely fenced at a time when s. 16 says you must: see the judgment of Humphreys J. in *Massey* v. *S. & P. Lingwood Ld.* (1), and see *Davies* v. *Batger & Co. Ld.* (2).

Rodger Winn for the first respondent: The introduction of these unreported cases puts a new complexion on the matter. Nevertheless, the minds of the previous Divisional Court judges were not directed to the argument that s. 16 is a mere appendage of s. 14. The point which I desire to argue was not expressly taken, namely that s. 16 is in its terms a separate, additional and positive obligation to the string of obligations imposed by ss. 12, 13 and 14. Section 16 enacts that it is not sufficient to have provided a guard (the requirement of s. 14)

(1) Divl. Ct., June 21, 1945, unreported.

(2) Divl. Ct., April 1, 1943, unreported.

but that, having done so, it must be maintained constantly in position while the machine is working (subject only to the exemptions provided for in the section). The summons in this case should have been brought under s. 16.

The Court of Appeal has had this point by implication in a civil action. The effect of the judgment of Tucker L.J. in *Nash* v. *High Duty Alloys Ld.* (1) is that s. 16 must be looked at to see whether there has been a breach of duty to a workman. That case clearly decided that there is a separate obligation under s. 16.

E. V. Falk represented the second respondent.

LORD GODDARD C.J.: This is a case stated by justices for the City of Oxford before whom Morris Motors Ld., were prosecuted for a breach of s. 14 of the Factories Act, 1937. It is unnecessary to say more about the breach than that the allegation was that a certain machine had not been securely fenced, whereby personal injury was caused to a workman of the name of Harris, who was brought into the proceedings before the magistrates under s. 137 of the Factories Act, it being alleged by the defendants that he was the person who was really responsible for the accident.

At the hearing it was proved that the machine in question was fitted with what I may call a movable fence, and if the fence was in one position—the position in which it ought to have been—at the time the workman was carrying out the operation which led to the disaster, it was perfectly safe. If, however, the fence was in another position, what was called the "raised" position, the machine was one which was capable of causing injury, and therefore was dangerous.

Thereupon Mr. Winn took the point that if the magistrates were satisfied that an adequate fence was provided, he was in a position to say that the proceedings ought to have been taken under s. 16 of the Act, and not under s. 14. He invited the prosecution to amend their proceedings and to put forward an information under s. 16; but the prosecution refused that invitation, and they elected to stand on the information which was before the court under s. 14. The magistrates held in favour of the employers, Messrs. Morris Motors Ld., holding that the machine was securely fenced and, apparently, taking the view that the proceedings might have been taken

(1) [1947] K. B. 377, 385.

1949

SMITH v. MORRIS MOTORS LD. AND HARRIS.

Lord Goddard C.J.

under s. 16, but as they were not, they dismissed the information.

[His Lordship read ss. 14 and 16, and continued :] This point has really been decided so far as this court is concerned, firstly by the decision in *Massey* v. *S. & P. Lingwood Ld.* (1) in the judgments delivered by Humphreys and Croom-Johnson JJ. The effect of that decision was that you have to look at the actual time when the accident takes place, and see whether the machine was securely fenced at that time. If there was no fencing on the machinery at that time an offence has been committed, and Humphreys J. went on to say in his judgment that s. 16 gives a sort of definition, an explanation, of what is meant by " securely fenced." Then he read the section and he treated it as indicating that the fencing must be substantial, that it must be properly maintained, and that it must be kept in position, and unless those things are done, the machine cannot be said to be securely fenced.

Further, the section deals with an exception. It excepts from the provisions of s. 14 the case where " such parts are necessarily exposed for examination and for any lubrication or adjustment shown by such examination to be immediately necessary, and all such conditions as may be specified in regulations made by the Secretary of State are complied with." So the section does those two things. It indicates the class of offence or the circumstances relating to the fencing which will make it secure fencing. At the same time it provides an exception which will afford a defence to the employer if he can bring himself within those words. But it does not create a new offence.

Much the same decision had been given by this court in the case of *Davies* v. *Batger & Co. Ld.* (2), in which the court really decided on the same lines as Humphreys and Croom-Johnson JJ. did in *Massey* v. *S. & P. Lingwood Ld.* (1).

Those two cases are binding on this court and show that an employer cannot say : " You ought to have proceeded " under s. 16 ; your real case against me is that I did not " maintain or keep in position." The court said : " If the " machine is not fenced at the time of the accident, an offence " is committed against s. 14."

Mr. Winn invited the court to say that the Court of Appeal had taken a different view in *Nash* v. *High Duty Alloys, Ld.* (3).

(1) Divl. Ct., June 21, 1945, unreported.

(2) Divl. Ct., April 1, 1943, unreported.

(3) [1947] K. B. 377.

On looking at that case, we cannot think that the Court of Appeal did take any different view, or that that case is in any way in conflict with the two decisions of this court to which I have referred. What the Court of Appeal were considering in that case really was whether or not the employers were entitled to rely on the exception created in s. 16, and that was all. They held on the facts of the case that they were not entitled to rely on that section. That case in no way conflicts with these decisions; we are bound by them, and argument has convinced me that there would be no reason to differ from them, even if we could do so.

The result is that the case will have to go back to the magistrates with an intimation that there was a case for Morris Motors Ld. to answer. They must therefore give a decision after hearing Morris Motors Ld. on the main summons and then proceed to hear the information under s. 137 of the Act, between Morris Motors Ld. and Kenneth Charles Harris, assuming, of course, that there is a conviction.

CROOM-JOHNSON J.: I am of the same opinion. The argument on behalf of the respondents is and was that s. 16 creates a totally subsidiary or extra obligation on the occupiers of factories, that is to say, separate, distinct and beyond those provided in s. 12, sub-s. 2, ss. 13 and 14. It is suggested that the court cannot construe those three sections each in its turn with s. 16 to find out what it means, unless proceedings have been launched under s. 16 which refer to "All fencing or other "safeguards provided in pursuance of the foregoing provisions "of this Part of this Act"; so that it is expressly directed to an explanation of statutory obligations which are imposed on the occupiers of factories under those three sections. I have, I hope, applied my mind with sufficient independence again today to the arguments which have been addressed to us, I will not say untrammelled, but having regard to the judgment of Humphreys J. in *Massey* v. *S. & P. Lingwood Ld.* (1), in which I concurred at the time. I have come to the conclusion that I was right in concurring in that judgment, and that the judgment of Humphreys J. was right on this point, and accordingly that the point that was taken before the justices on the hearing of the complaint in this case was not one to which the justices ought to have given way. I concur in the judgment which is proposed by my Lord.

(1) Divl. Ct., June 21, 1945, unreported.

LYNSKEY J.: I agree, and I have very little to add. It seems to me that s. 14 is the section of the Act which imposes the duty to fence. That section says: "Every "dangerous part of any machinery other than prime movers "and transmission machinery, shall be securely fenced." If that section stood alone, it would mean that there was an obligation on the employer at all times and in all circumstances to have his machinery properly fenced. Section 16, however, which is introduced into the Act, applies not only to s. 14, but also as to fencing called for under ss. 12 and 13. The effect of s. 16 is to indicate how and when the duty imposed under ss. 12, 13 and 14 is to be carried out. That duty is to be carried out so far as the provision of fencing is concerned, by providing fencing of substantial construction and it is further to be carried out by constantly maintaining the fencing, which means keeping it in good and efficient working order, and repair; and also keeping it in position while the parts required to be fenced or safeguarded are in motion or use, with certain exceptions. The effect really is that ss. 14 and 16, read together, impose this duty: s. 14 imposes the duty, and s. 16 defines its extent, and also introduces exceptions as to when it need not be carried out.

In these circumstances, it seems to me, if I may say so with respect, that the decision of this court in *Massey* v. *S. & P. Lingwood Ld.* (1) was right, and that where a summons is issued for breach of fencing regulations, it is properly issued under s. 14, because it is s. 14 which really imposes the duty. In those circumstances, it is not necessary nor, indeed, possible to lay an information under s. 16.

For those reasons, in my view, the appeal should be allowed.

The court made no order as to costs, and in dealing with the position of Harris,

LORD GODDARD C.J. said: It should be understood in these third party proceedings that if the third party—and I use that expression for convenience—feels that he does not want to argue the point, because at the moment no order has been made against him, he need not appear. The reason why he must be joined as a party to the proceedings is that if the case is sent back, as this case is being sent back, and the third party has not been brought here, the proceedings between the defendant and the third party would be at an end, and that

(1) Divl. Ct., June 21, 1945, unreported.

would be unfair to the defendant. That is why we said the third party must be made a party to the case and served (1), but there is no reason why he should incur expense in coming here unles he wants to take part in the argument. If he does, he may become liable for costs.

Appeal allowed without costs and case remitted to the justices.

Solicitor for the appellant: *The Solicitor, Ministry of Labour and National Service.*

Solicitor for the first respondents: *Preston, Lane-Clayton & O'Kelly for Herbert & Gowers & Co., Oxford.*

Solicitor for the second respondent: *W. H. Thompson.*

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(1) See *Elkington* v. *Kesley* [1948] 2. K.B. 256.

Considered. CAWOOD, WHARTON LD. v. SAMUEL WILLIAMS & SONS LD. THE CAWOOD III [1951] P. 270

Reversed. H.L. [1951] 1 All E.R. 1078.

Reversed. BOLTON v. STONE [1951] A. C. 850

STONE v. BOLTON AND OTHERS.

C. A.

1949
Oct. 13, 14;
Nov. 2.

Somervell, Singleton and Jenkins L.JJ.

Personal injuries—Cricket club ground—Ball hit into highway—Pedestrian on highway struck and injured—Public nuisance—Negligence.

The plaintiff had just stepped through her garden gate on to a highway when she was struck on the head by a cricket ball and injured. The ball had been hit by a player on a cricket ground, the northern boundary of which abutted on to the highway. The ground, which the trial judge found to be "quite large enough "for all practical purposes," was surrounded by a twelve feet fence or hoarding which, owing to a rise in the ground, was at the northern end 17 feet above the level of the wicket. The southern wicket, from which the ball was hit, was about 78 yards from the northern boundary fence. The plaintiff sued the defendants, as representing the members of the club, for damages for personal injuries, alleging negligence and also that the striking of the cricket ball into the highway constituted a public nuisance.

Held, that the fact that in the course of over thirty years balls had occasionally been hit into the highway, was not sufficient to constitute the playing of cricket on the ground in question a public nuisance: Castle v. St. Augustine's Links Ld. (1922) 38 T. L. R. 615 distinguished.

Held further (Somervell L.J. dissenting), that the defendants, having knowledge that balls had been, and might again be, hit over the northern fence, owed a duty to take reasonable care to avoid or prevent injury or damage to users of the highway; that having neglected to give consideration to the matter they had failed to exercise the care which the circumstances demanded and were responsible in damages for negligence.

Decision of Oliver J. reversed.

C. A.

1949

STONE
v.
BOLTON.

APPEAL from Oliver J.

On August 9, 1947, the plaintiff, Miss Bessie Stone, of 10, Beckenham Road, Cheetham, near Manchester, had just stepped from her garden gateway on to the pavement of the highway when she was struck on the head by a cricket ball and suffered injury. The ball had been driven by a player of a visiting team over the fence or hoarding surrounding the Cheetham Cricket Club ground, which at its northern boundary abuts on to the Beckenham Road. The said ground had been in use as a cricket club for some 80 to 90 years. The fence or hoarding surrounding it was 12 feet high and at the northern boundary, owing to a rise in the ground, was 17 feet above the level of the wicket. In 1910, in order to facilitate a building scheme, the club had surrendered land at the northern end (on part of which Beckenham Road was constructed) and received in exchange land at the southern end. The wickets had previously been, and continued to be, pitched north and south, and in consequence of the exchange of land were nearer to the northern than to the southern boundary. The distance from the southern wicket to the northern boundary fence was estimated to be 78 yards. The "hit" in question was described by a member of the club with long experience as "quite the biggest seen on that "ground," but evidence was adduced at the trial that on some six to ten occasions cricket balls had been hit over the fence into the road in the past 30 years.

The plaintiff sued the defendants, as representing all the members of the club, for damages for personal injuries, alleging that the defendants were negligent and also that the striking of the cricket ball into the highway constituted a nuisance, for the consequences of which the defendants were responsible in law. The case came on for hearing before Oliver J. at Manchester Assizes on December 20, 1948, and the learned judge dismissed the claim. He did not, he said, think that a single isolated act causing direct damage could properly be brought under the head of nuisance to a highway, and in his opinion the plaintiff had failed to establish negligence.

The plaintiff appealed.

Nelson K.C. and *H. Burton* for plaintiff. It is admitted that persons on land dedicated as a highway must accept the ordinary risks of the highway, but they do not accept the risk of missiles passing across it. The authorities show that if the occupier of land carries on on it any operation which may cause damage to persons using the highway, he is committing a public nuisance, and immediately injury is caused to a user of the highway that injured person has a right of action. Striking a cricket ball on to the highway is an illegal act, and once the cricket club became aware that a ball could be hit over the boundary fence it became the duty of the club to take all reasonable precautions to prevent it happening. It is not the carrying on of a cricket club on a field adjacent to the highway that is a public nuisance but the striking of a ball or balls on to the highway to the danger of the public. If the court is satisfied that this was a public nuisance then the party injured is entitled to succeed on her claim for damages without proof of negligence. In the present case the defendants had knowledge that balls had on previous occasions been hit over the boundary fence and across the highway. The onus therefore lies on them to show that they have taken all reasonable steps to safeguard the public using the highway. This is a case of res ipsa loquitur. The fact that the plaintiff was struck on the head while using the highway points to negligence on the part of somebody and it is for the defendants to prove that they were not negligent.

[Singleton L.J. If there is no evidence that the committee of the club ever considered the question of the danger to users of the highway, what is the position in law ?]

The committee having knowledge that action was called for, and the evidence disclosing that no action was taken, they were guilty of negligence. The plaintiff is entitled to succeed both in nuisance and in negligence.

[*Fritz* v. *Hobson* (1) ; *Midwood & Co. Ld.* v. *Manchester Corporation* (2) ; *Tarry* v. *Ashton* (3) ; *Castle* v. *St. Augustine's Links Ld.* (4) ; *Dollman* v. *A. & S. Hillman Ld.* (5) ; *Slater* v. *Worthington Cash Stores* (1930) *Ld.* (6) ; *Leanse* v. *Egerton* (7) ; *Ward* v. *Abraham & Co.* (8) ; *Glasgow Corporation* v. *Muir* (9) ; *Rylands* v. *Fletcher* (10) ; and *Read* v. *J. Lyons & Co. Ld.* (11) were referred to.]

(1) (1880) 14 Ch. D. 542.
(2) [1905] 2 K. B. 597.
(3) (1876) 1 Q. B. D. 314.
(4) (1922) 38 T. L. R. 615.
(5) [1941] 1 All E. R. 355.
(6) [1941] 1 K. B. 488.
(7) [1943] K. B. 323.
(8) 1910 S. C. 299.
(9) [1943] A. C. 448.
(10) (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330.
(11) [1945] K. B. 216.

H. Dean for the defendants. It is difficult to understand how the committee and members of the cricket club can be said to be responsible for the particular incident which resulted in injury to the plaintiff. It cannot be said that they authorized or permitted the ball on this particular day to be hit into the road. The learned judge below has found that it was a most exceptional hit. In *Ward* v. *Abraham & Co.* (1), it might reasonably have been thought that that which took place was authorized or allowed, because it was a more than likely occurrence, but the Court of Session did not draw that inference. But an isolated act, such as occurred in the present case, cannot in itself constitute a nuisance, and the learned judge was right in so holding. The injury or damage which completes the cause of action may occur at a momentary point of time, but in the authorities cited that momentary occurrence is always to be found to be the outcome of a state of affairs which has been created, maintained, or permitted to continue by the defendant occupiers. That becomes apparent from an analysis of all the authorities. If the alleged nuisance consists not in the striking of the ball out of the ground but in the use of this land, in the circumstances, for cricket, there was no evidence to justify a submission that that use was a nuisance. It has been sought to put this case on the footing of *Castle* v. *St. Augustine's Links Ld.* (2), but that case is distinguishable. It is purely a question of fact and degree and the answer to this aspect of the plaintiff's case is contained in the following quotation from Halsbury's Laws of England, Hailsham edition, vol. 24, p. 22, which I wish to make part of my argument: "An act which is in "ordinary circumstances innocent may under particular "conditions become an actionable nuisance. Whether such "an act does constitute a nuisance must be determined, "not merely by an abstract consideration of the act itself, "but by reference to all the circumstances of the particular "case, including, for example, the time of the commission "of the act complained of; the place of its commission; "the manner of committing it, that is, whether it is done "wantonly or in the reasonable exercise of rights; and the "effects of its commission, that is, whether these effects "are transitory or permanent, occasional or continuous; "so that the question of nuisance or no nuisance is one of "fact." It is submitted that the defendants were not negligent. They were engaged in a perfectly lawful pursuit,

(1) 1910 S. C. 299. (2) (1922) 38 T. L. R. 615.

which in normal circumstances was innocuous. The learned judge has found that the ground was large enough for all practical purposes. The defendants were not insurers, and if what they in fact did was sufficient to give the public reasonable protection, then, whether or not their motive was the protection of the public, they have done all that was required of them.

Cur. adv. vult.

Nov. 2. SOMERVELL L.J. I will ask Singleton L.J. to deliver the first judgment.

SINGLETON L.J. stated the facts and continued: On the appeal Mr. Nelson put nuisance in the forefront of the plaintiff's case, and in support of it he relied not only on the allegation as framed in the statement of claim but on the fact that over a long period balls had from time to time been hit into Beckenham Road, that the defendants were causing a public nuisance thereby, and that as the plaintiff had suffered damage therefrom she was entitled to succeed in the action. It seems to me that an answer to the nuisance claim as pleaded is that the striking of the ball which hit the plaintiff was not the act of the defendants, or of any servant or agent of theirs or of anyone for whose acts they are responsible. The player who struck the ball is not a party to the action. The claim that the defendants caused a public nuisance in promoting or arranging cricket matches on this ground causes greater difficulty. There is no doubt that balls were hit over the fence and into Beckenham Road from time to time over a long span of years: the evidence of both sides shows that. There is, however, nothing to show that before this accident any discomfort or interference had been caused. There is no evidence of any complaint or of any inconvenience to anyone before August 9, 1947. In these circumstances, I am not disposed to hold that the playing of cricket on this ground constituted a public nuisance by reason of the fact that occasionally—and it was very seldom—a ball was hit into Beckenham Road. Reliance was placed by Mr. Nelson on the decision in *Castle* v. *St. Augustine's Links Ld.* (1). In that case the evidence was to the effect that golf balls were very frequently sliced on to or over the public highway; there was evidence of substantial interference with the use and enjoyment of the road: in that respect the case is distinguishable from the one before this court.

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(1) 38 T. L. R. 615.

I now come to deal with the claim based on negligence, which is in effect an allegation that the defendants failed to exercise the care which the circumstances demanded. The ground is surrounded by a hoarding. On the western side, adjoining Waterloo Road, the hoarding is 12 feet high and it is useful in providing revenue from advertisements. On the northern, or Beckenham Road, end the hoarding is approximately 7 feet high, but it is on higher ground so that the top of it is 17 feet above the level of the wicket. The plan shows that the length of the ground from north to south, measured to the boundary, is 413 feet: beyond that there is a short distance at each end between boundary and hoarding. The wickets are pitched nearer to the northern end than to the southern end of the ground. It would appear from the evidence of Mr. Milsom, one of the defendants, that this resulted from the alteration of the ground in 1910 or 1911: the wickets were left opposite the pavilion which is on the western side of the ground. The result is that the northern wicket is 152 feet from the northern boundary whereas at the other end there is a distance of 195 feet between the southern wicket and the southern boundary—and in each case a further 17 feet or thereabouts between boundary and hoarding. The ball which caused the injury was hit by the batsman at the southern wicket. Oliver J. in the course of his judgment, said that the distance from the striker to the fence was about 90 yards. I cannot make it so much as this: allowing 66 feet, the length of the pitch, I make it 152 plus 66 plus 17, equals 235 feet, or about 78 yards. From the northern end wicket to the southern hoarding is about 92 yards.

At the time she was injured the plaintiff was on the highway. An accident of this kind does not happen in the ordinary course of things if proper care is exercised, and it seems to me that the defendants are called upon to explain it. Whether that be so or not, evidence was given on behalf of the plaintiff by a Mr. Brownson, who lives at No. 11, Beckenham Road, who said that on some five or six occasions cricket balls had struck his house or had fallen in his garden; that is to say, they had been hit over the hoarding. He was speaking of the last year or two before the accident. On behalf of the defendants Mr. Newbold, captain of the home side on August 9, 1947, said he remembered hits into Beckenham Road, adding, "but I should say I have never seen it hit into "Beckenham Road during a match more than half a dozen "times in all the years I have been to the ground—28." He described the offending hit as quite the biggest he had seen on the ground. Mr. Milsom, one of the defendants, thought the hit was the best he had ever seen on the ground. Mr. Bolton, another of the defendants, recollected balls having been struck into Beckenham Road from six to ten times in a period of 33 years, and he appeared to indicate that it might have been when they were practising at that end of the ground.

On this evidence it is clear that the defendants knew that there was a risk that any day a ball might be hit over the northern hoarding and into Beckenham Road. Such a hit involved danger to anyone on the road: that is obvious. In such circumstances there was a duty on those responsible (the occupiers) to take reasonable care to avoid or prevent injury or damage to anyone on the highway. Clearly they ought to have considered how this could be done. They are not justified in sitting down and doing nothing until someone is injured. I am unable to find from the evidence that there was ever any consideration given to the matter from the time the hoarding was erected in 1910 or 1911. If they had considered it, they might have decided to raise the height of the hoarding at the northern end. That would have reduced the risk of a hit into Beckenham Road though it might not have been sufficient to prevent this one carrying into the road. They might have decided upon a change in the position of the wickets longitudinally. If they had placed them at equal distances north and south a hit over the northern hoarding would have had an additional carry of 21 feet. This would have added to the safety of those using Beckenham Road, and, incidentally, the plaintiff would not have been hit on the head if it had been done. It is most undesirable that a high standard should be applied in a case of this kind. If the defendants had considered the matter, and decided that the risks were very small and that they need not do very much, there might have been something to be said for them. So far as the evidence shows, they did nothing. That being so, they were failing in their duty and the burden ought to fall upon them and not upon a person injured on the highway.

In dealing with the question of negligence, Oliver J. said:

"Upon the evidence before me I cannot find the committee "were negligent. In my opinion, this ground is quite large "enough for all practical purposes of safety, particularly "having regard to the height of the fence above the pitch; "it cannot be forgotten that in 38 years' experience no one "has ever been injured before. In the present case, therefore, "I acquit the defendants of negligence." He had already said that the distance from the striker was about 90 yards which, as I have pointed out, was an error. I do not know that he would have taken another view if he had had the correct measurement, though he might have done so. With respect to the learned judge, I do not think he applied the proper test. The ground may have been quite large enough for all practical purposes of safety, but with the wickets as pitched a ball was driven into Beckenham Road now and then and the defendants were aware of this. In those circumstances they had a duty to take reasonable care, a duty to consider how the risk to anyone in Beckenham Road could be reduced, and, further, a duty to take reasonable steps to reduce a danger which could be foreseen. They failed to carry out their duty in any one of these respects. It is true to say that the plaintiff was injured through a big hit, but I cannot see from the evidence given that it was of so exceptional a nature that one like it could not be anticipated. There was indeed little evidence of an expert character on this head, or as to the lay-out of a cricket ground.

In my view, the defendants failed to exercise the care which the circumstances demanded and they are responsible in damages for negligence. I would allow the appeal and order that judgment be entered for the plaintiff for 104*l.* 19*s.* 6*d.*, the sum provisionally assessed.

JENKINS L.J. With the learned judge's reasoning and conclusion on the issue of nuisance I agree. I do not think a single isolated act causing direct damage, such as the striking of a person on the highway by a cricket ball hit from adjacent premises, can properly be brought under the head of nuisance to a highway. The gist of such a nuisance, as it seems to me, is the causing or permitting of a state of affairs from which damage is likely to result. If damage does in fact result to some individual on the highway, the person causing or permitting the state of affairs is liable because the state of affairs from which the damage flowed was due to his act or omission. It follows, in my view, that the plaintiff in this case could only succeed in nuisance on the footing that the playing of cricket on the Cheetham Club's ground amounted to a nuisance, which resulted in damage to herself in the shape of the blow she received from the errant ball. A claim in this form, although not pleaded, was argued before us and also apparently before the learned judge. I am satisfied that it cannot succeed on the facts, which clearly establish that balls have been hit out of the ground only on rare occasions, and accordingly that the use of the ground for cricket, with the fences as they are, and pitch sited as it is, cannot in itself be said to constitute a continuing source of danger to the neighbourhood or the public. *Castle* v. *St. Augustine's Links Ld. and Another* (1), in which golf balls were shown to have been repeatedly sliced into the highway by players hitting from the adjacent tee of a hole running parallel with the road, was rightly distinguished by the learned judge. If I am wrong in my view that the isolated act of hitting the ball which struck and injured the plaintiff cannot rightly be brought under the head of nuisance, I do not think the members of the Cheetham Club can be held to have caused or permitted the batsman concerned to make the particular hit constituting the nuisance, so as to make them liable under this head.

On the issue of negligence the learned judge said this: "Upon the evidence before me I cannot find the Committee "were negligent. In my opinion, this ground is quite large "enough for all practical purposes of safety, particularly "having regard to the height of the fence above the pitch; "it cannot be forgotten that in 38 years experience no-one "has ever been injured before. In the present case, therefore, "I acquit the defendants of negligence." He also considered the applicability of the doctrine of *Rylands* v. *Fletcher* (2), and held, in my view quite rightly, that this doctrine had no application. He further accepted an argument for the defendants to the effect that in as much as the cricket ground was in existence at the time Beckenham Road was dedicated as a public highway, the dedication took effect subject to any risks arising from the presence of the ground and its user for playing cricket. This argument was abandoned by the defendants before us, and I need therefore say no more about it.

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(1) 38 T. L. R. 615.

(2) L. R. 3 H. L. 330.

C. A.
1949
STONE
v.
BOLTON.
Jenkins L.J.

Reverting to the issue of negligence, I find myself unable to accept the learned judge's conclusion on this aspect of the case. To support the claim in negligence it must be shown: (*a*) that the defendants were under a duty (absolute or qualified) to prevent balls being hit out of their ground to the danger of persons on the adjacent highway, and (*b*) that the hitting out of the ground of the ball which struck the plaintiff involved a breach of that duty. That the defendants, being the occupiers of the ground, and using it as they did for the purpose of playing cricket matches organized by them, were under some duty to prevent balls being hit out of the ground to the danger of persons in Beckenham Road I have no doubt. It is less easy to define the precise extent of the duty. To hold the defendants under an unqualified duty to prevent balls being hit into the road under any circumstances would, I think, be to place an unreasonably heavy burden on them. The playing of cricket is, after all, a perfectly legitimate use of land, and if on the facts of the case the distance of the wicket from the Beckenham Road boundary, and the height of the fence on that side of the ground, were such as to make the hitting of a ball into the Beckenham Road an occurrence which could not reasonably have been foreseen, then I think it would probably have been right to absolve the defendants from liability for the hit by which the plaintiff was injured.

But legitimate as the playing of cricket may be, a cricket ball hit out of the ground into a public highway is obviously capable of doing serious harm to anyone using the highway who may happen to be in its course, and I see no justification for holding the defendants entitled to subject people in Beckenham Road to any reasonably foreseeable risk of injury in this way. Accordingly, I am of opinion that the defendants were under a duty to prevent balls being hit into Beckenham Road so far as there was any reasonably foreseeable risk of this happening. The case as regards negligence, therefore, seems to me to resolve itself into the question whether, with the wickets sited as they were, and the fence at the Beckenham Road end as it was, on August 9, 1947, the hitting into Beckenham Road of the ball which struck and injured the plaintiff was the realization of a reasonably foreseeable risk, or was in the nature of an unprecedented occurrence which the defendants could not reasonably have foreseen.

On the evidence this question seems to me to admit of only one answer. Balls had been hit into Beckenham Road before. It is true this had happened only at rare intervals, perhaps no more than six times in thirty seasons. But it was known from practical experience to be an actual possibility in the conditions in which matches were customarily played on the ground from about 1910 onwards, that is to say, with the wickets sited substantially as they were, and the fence at the Beckenham Road end, I gather, exactly as it was as regards height and position on August 9, 1947. What had happened several times before could, as it seems to me, reasonably be expected to happen again sooner or later. It was not likely to happen often, but it was certainly likely to happen again in time. When or how often it would happen again no one could tell, as this would depend on the strength of the batsmen playing on the ground (including visitors about whose capacity the defendants might know nothing) and the efficiency or otherwise of the bowlers. In my opinion, therefore, the hitting out of the ground of the ball which struck and injured the plaintiff was a realization of a reasonably foreseeable risk, which because it could reasonably be foreseen, the defendants were under a duty to prevent.

The defendants had, in fact, done nothing since the rearrangement of the ground on the making of Beckenham Road in or about 1910, whether by heightening the fence (e.g., by means of a screen of wire netting on poles) or by altering the position of the pitch, to guard against the known possibility of balls being hit into Beckenham Road. It follows that, if I have rightly defined the extent of the defendants' duty in this matter, the hitting out of the ground of the ball which injured the plaintiff did involve a breach of that duty for the consequences of which the defendants must be held liable to the plaintiff in damages.

I should add that I attach some importance to the onus of proof. The case is, I think, one to which the doctrine of res ipsa loquitur can be fairly applied: *Byrne* v. *Boadle* (1). The plaintiff is struck and injured by a cricket ball hit out of a ground occupied and controlled by the defendants. Surely that circumstance in itself suffices to place on the defendants the burden at least of showing either that the event was one which they could not reasonably have foreseen as a consequence of their use of the ground for cricket, or that the event was one which they had taken all reasonably practicable steps to

(1) 2 H. & C. 722.

C. A.

1949

STONE
v.
BOLTON.

Jenkins L.J.

prevent. This burden the defendants have, as it seems to me, wholly failed to discharge. The hitting of a ball into the road *was* a reasonably foreseeable event, and no steps at all had been taken to prevent it beyond the erection and subsequent maintenance in its original form of the fence put up in or about 1910, which had been shown by experience to be inadequate. We were, in effect, invited to hold that in as much as the hitting of a ball into Beckenham Road was a rarity, and the odds were against anyone in Beckenham Road being struck on one of the rare occasions when this did happen, the risk of anyone being injured in this way was so remote that the defendants were under no obligation to take any further precautions at all, but were entitled to subject people in Beckenham Road (whether cricket enthusiasts or not) to this remote risk, so to speak in the interests of the national pastime. I see no justification for placing cricketers in this privileged position.

It was further, in effect, argued that the carry of some 98 yards achieved by the ball which hit the plaintiff was so exceptionally long as to make at all events the particular hit in question, as distinct from the ordinary run of occasional hits into the road, an unforeseeable occurrence. I am by no means satisfied that this was the case, and in the absence of more definite and authoritative evidence as to the distance a cricket ball can be hit, I decline to assume in the defendants' favour that it was. But even if it was the case, I do not think this circumstance would assist the defendants. The material point in my view is that the hitting of the ball far and high enough to go out of the ground into Beckenham Road *was* an event which could reasonably be foreseen. Once the ball was out of the ground the mischief was done so far as the defendants could do anything to prevent it. I do not see how their liability for any resulting damage can be made to depend on any nicely calculated less or more of distance outside the ground to which the ball might happen to fly or bound before striking the injured party.

It was also, I think, suggested that no possible precaution would have arrested the flight of this particular ball, so high did it pass over the fence. This seems to me an irrelevant consideration. If cricket cannot be played on a given ground without foreseeable risk of injury to persons outside it, then it is always possible in the last resort to stop using that ground for cricket. The plaintiff in this case might, I apprehend, quite possibly have been killed. I ask myself whether in that event the defendants would have claimed the right to go on as before, because such a thing was unlikely to happen again for several years, though it might happen again on any day on which one of the teams in the match included a strong hitter. No doubt as a practical matter the defendants might decide that the double chance of a ball being hit into the road and finding a human target there was so remote that rather than go to expense in the way of a wire screen or the like, or worse still abandon the ground, they would run the risk of such an occurrence and meet any ensuing claim for damages if and when it arose. But I fail to see on what principle they can be entitled to require people in Beckenham Road to accept the risk, and, if hit by a ball, put up with the possibly very serious harm done to them as damnum sine injuria, unless able to identify, trace, and successfully sue the particular batsman who made the hit.

For these reasons I am of opinion that the plaintiff is entitled to succeed on her claim in negligence, and I would allow the appeal with judgment for the appellant in the sum of 104*l*. 19*s*. 6*d*. damages as assessed by the learned judge, and costs here and below.

Somervell L.J. The case for the plaintiff before us was put first on the ground of public nuisance to a highway. This is, of course, an indictable misdemeanor. It is pleaded as follows: "Further the plaintiff will contend that the "striking of the said cricket ball into the said road was and "constituted a nuisance for the consequences of which to "the plaintiff, the defendants are in law responsible." I do not think that the striking of a cricket ball by an individual batsman, whether he was, as here, a visitor or whether he had been one of the joint occupiers, could be an indictable misdemeanor by all the occupiers. If the plaintiff is to succeed on this ground it must be put, as Mr. Nelson put it in the alternative, namely, that the organizing and carrying on of a game on property adjacent to a highway, so that the public right of passage is rendered dangerous, is a public nuisance. The question, therefore, as it seems to me, is whether the fact that once every three or four years a very exceptional hit takes a ball into this highway constitutes a public nuisance. As the tort relied on is an indictable offence it is unfortunate that it was not pleaded in the only

C. A.

1949

STONE
v.
BOLTON.

Somervell L.J.

way in which, in my opinion, it can be put. I have derived assistance from the reasoning of Sankey J. in the somewhat analogous case of *Castle* v. *St. Augustine's Links Ld.* (1). In that case the plaintiff on a highway was injured by a sliced golf ball driven from a tee. Sankey J. found that the tee and lay-out of the hole constituted a public nuisance for which the club was responsible. He found that the hole was so laid out that balls were frequently landed in the highway; and that the directors knew or ought to have known this. He found that the highway was much frequented by motors and taxicabs and that on previous occasions balls had struck vehicles passing along the highway. If Mr. Nelson is right, it would have been sufficient if on very rare occasions an altogether exceptional shot had reached the highway. Sankey J. was, of course, dealing with the facts of that case and with golf, not cricket, but in considering the number of occasions, the amount of traffic on the road, in other words the degree of risk, he was, I think, applying the law correctly in dealing with this class of problem, namely, games near highways. Applying to cricket this test, namely, one of degree, to the question whether the lay-out of this cricket field was such as to render the highway dangerous in a way that amounted to a public nuisance, I think that it was not. There is a curious absence of authority on cases of this kind. We were referred to the Scottish case of *Ward* v. *Abraham* (2), but I do not think that that decision helps in the present case.

There remains the question whether the plaintiff has established that her injuries were due to the negligence of all the occupiers of this cricket ground. I conceive myself entitled to take judicial notice of the fact that games, notably cricket, are part of ordinary life, and that available fields will often and necessarily be adjacent to highways. Mr. Nelson, I think, invited us to say that occupiers of a field or ground where games were played were negligent if in any foreseeable circumstances, however exceptional, a ball might reach any highway. This would, I think, be unreasonable, and the fact that the occupiers could insure their liability is irrelevant. Whether a man is or is not a tortfeasor cannot depend on whether others are willing to insure his liability. The steps that a reasonable occupier would take depend on the circumstances. If the field is in the heart of a city, surrounded by roads on which there is constant traffic, it may well be that

(1) 38 T. L. R. 615.

(2) 1910, S. C. 299.

the reasonable occupier would have to see that in no foreseeable circumstances could a ball reach a highway. For a village playing field, adjacent to a little-frequented highway, the duty would be less. I think this is a border line case. On the one hand it can be said that there was no evidence that the defendants, knowing that on very exceptional occasions a ball was hit out into the road, directed their minds to the question whether any reasonable steps could be taken to prevent this ever happening. On the other hand, the plaintiff had to establish that if reasonable steps had been taken this accident would not have occurred. The case is not wholly satisfactory in that it was in the main pleaded and argued on the basis that the fact that this ball came into the road and, after the defendant's evidence, that on rare occasions other balls had entered the road, was sufficient to establish liability. I think this is not enough. Mr. Newbold, a defendant, who had been a member of the club for 28 years, said that in that period he had seen a ball hit into the road perhaps half a dozen times. He described the hit which caused the damage as the biggest hit he had ever seen on the ground. Mr. Milsom agreed with this and said that it cleared the fence by many, many feet. Comment was made on the fact that the pitch was nearer to the highway boundary than to the other boundary, but there was no cross-examination on the lines that this showed a failure to take due care. There was this fence, 17 feet above the pitch at the Beckenham Road end, and no evidence as to the bank, if any, or fence at the other end of the ground. The case is difficult, partly because the real issue does not seem to me to have been clearly raised, either in the pleadings or cross-examination. This may have been because the plaintiff's advisers thought they could not succeed except on the case as they put it.

On the whole, I have come to the conclusion that the appeal fails. Mr. Nelson criticized the sentence in the judgment in which the learned judge said that in his opinion this ground is quite large enough for all practical purposes of safety. I agree this goes beyond what is necessary to decide this case. The question is whether the plaintiff has shown that the damage which she suffered was due to the failure of the defendants to take due and reasonable care. On the evidence as a whole, and as accepted by the learned judge, I think she has failed to establish this. The principle

C. A.

1949

STONE
v.
BOLTON.

Somervell L.J.

of *Rylands* v. *Fletcher* (1) has, in my opinion, no application and this point, though taken, was not seriously argued.

I therefore would dismiss the appeal.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors for plaintiff: *L. Bingham & Co., for Linder, Myers and Pariser, Manchester.*

Solicitors for defendants: *Hall, Brydon, Harvey and Egerton, for Hall, Brydon and Chapman, Manchester.*

A. W. G.

(1) L. R. 1 Ex. 265

C. A.

1949
Oct. 28.

Bucknill, Denning and Jenkins L.JJ.

COLTON *v.* BECOLLDA PROPERTY INVESTMENTS LD.

Landlord and tenant—Rent restriction—Premium payable for grant of a lease—Oral agreement between landlord company's managing director and proposed tenant for payment of premium on a tenancy of 14 *years from a future date—Company writes, after that date, confirming that agreement—Lease executed subsequently, providing for this payment—Habendum—" To hold unto the tenant " from the earlier date—" Grant, renewal or continuance for a term of* 14 *years " or upwards of any tenancy "—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 8, *sub-ss.* 1 *and* 3*—Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 *and sch. I.*

On September 28, 1948, the managing director of a company, landlords of a flat, a new control dwelling-house, being the chairman of the board, agreed orally to the offer of X., a statutory tenant of the flat to take it for a term of 14 years from September 29, 1948, on terms which included the payment of a premium of 700*l.*, which was required by the landlords, subject to confirmation by the board of directors. On October 5, 1948, the chairman wrote to X. that after consultation with his board, they had decided to accept his offer. On January 7, 1949, the parties executed a lease containing the terms agreed, including the payment of a premium, the habendum of which was: " To hold " unto the tenant from the 29th day of September, 1948, for the " term of 14 years."

Held, that since the premium was required by the landlords before September 29, 1948, as a condition of granting the lease, there was a grant for a term of 14 years of a tenancy within the meaning of sub-s. 3 of s. 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 3 and sch. 1 of the Rent and Mortgage Interest Restrictions Act, 1939, with regard to a new control dwelling-house. The condition in the lease, requiring the premium, related back to the original requirement for that premium made by the landlords before September 29, 1948. The premium, therefore, was not prohibited by the terms of sub-s. 1 of s. 8.

Per Curiam: Had there been no proof of the requirement of a premium by the landlords before September 29, 1948, but merely of the lease executed on January 7, 1949, for a tenancy for 14 years from September 29, 1948, the only interest granted would have been for 14 years less the period between September 29, 1948, and January 7, 1949—a period of less than 14 years.

Earl of Cadogan v. *Guinness* [1936] Ch. 515, approved.

Per Curiam: The fact that a provision in the lease, that the balance of the premium, part of which was payable in each of the 14 years, should become immediately payable if the tenant assigned or sub-let the flat (with one exception), was inserted by agreement, after September 29, 1948, in the circumstances, did not affect the decision. There was no reason why the parties should not after that date on accepting the final form of the lease alter the mode in which the premium was to be paid.

APPEAL from Marylebone county court.

In the autumn of the year 1940, the plaintiff (as the county court judge found) was a statutory tenant of a flat, No. 3, Elsworthy Court, Hampstead, a new-control dwelling-house subject to the Rent Restriction Acts. Desiring a lease for 14 years, for which he could obtain a premium on assignment, he approached the landlords of the flat, the defendants, to obtain such a lease. On September 17, 1948, Mr. Beard, the chairman and managing director of the defendant company, wrote to the plaintiff: "I shall be glad if you will confirm "that the terms quoted are acceptable to you before the next "board meeting, when I have to report on this case. You "will appreciate that if the terms are not acceptable the "offer must be withdrawn, and if this happens I feel that "you will lose the opportunity as the board would not re-open "negotiations at a later date." On September 18, 1948, the plaintiff wrote to Mr. Beard: "I feel it would be more "acceptable to me if your board would consider the sum" (with regard to his suggested amount for premium of 700*l.*) "of 140*l.* now, and 40*l.* per annum thereafter (subject to "contract)." On September 21, Mr. Beard wrote to the plaintiff: "If you will amend your suggestion to 150*l.* cash

C. A.
1949

COLTON
v.
BECOLLDA
PROPERTY
INVESTMENTS
LD.

"down now and 50*l*. per annum I will try and persuade the "board to agree." And on September 28 the plaintiff wrote to Mr. Beard: "With reference to your letter of the 21st inst., "and our subsequent telephonic conversation, I shall be "obliged if you will put my offer before the board for their "consideration. For the reasons already explained to you, "I feel I cannot amend my offer." On October 5, 1948, Mr. Beard, signing "for Becollda Property Investments Ld." wrote: "I have received your letter of the 28th September. "I have now had an opportunity of consulting my board "with regard to your offer for you to take up a lease of this "flat for fourteen years at the present rent of 190*l*. per annum "inclusive on payment of a premium of 700*l*., payable as to "140*l*. cash, and the balance at the rate of 40*l*. per annum. "The rent would be subject to any increased rates and water "rate over and above those ruling at 1939, and to one eighth "of the increase in the cost of gas for constant hot water "and central heating over and above 120*l*. per annum, in "accordance with the recent agreement. The board feel "that in the interests of both parties it is very desirable "that the position so far as you are concerned should be "regularized and in consequence, they have decided to accept "your offer. You will be responsible for all interior repairs "as at present, and the board will require an undertaking "that you will carry out any repairs and decorations our "surveyor considers necessary, after inspection. Will you "please let us know when it will be convenient for him to "call."

A lease containing these terms was executed on January 7, 1949, "to hold unto the tenant from the 29th day of September "1948 for the term of 14 years (determinable as hereinafter "mentioned)." By para. 6: "If the tenant shall . . . . "assign or underlet the said flat (except furnished for periods "not exceeding six months with the consent of the landlord) "then the whole of the balance of the said sum of 560*l*. "(40*l*. x 14) for the time being unpaid shall thereupon become "due and payable." The lease was determinable by the tenant at the end of the seventh year of the term by six months' notice, in which event the liability for the last seven instalments of 40*l*. each of the premium was to cease.

The plaintiff paid the 140*l*., part of the premium of 700*l*., to the defendants but thereafter assigned the lease to a purchaser from whom he required a premium and in March, 1949, sued the defendants for the return of the 140*l.* under the terms of s. 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Act of 1939, contending that the grant of the lease was for a term of less than 14 years. The defendants counterclaimed for 560*l.* under the terms of para. 6 of the lease.

At the hearing the evidence consisted of the agreed correspondence and the testimony of Mr. Beard for the defendant company. He testified that the telephonic conversation to which the plaintiff had referred in his letter of September 28, 1948, was as follows: He—Mr. Beard—took the responsibility of accepting the plaintiff's offer of a premium of 140*l.* and 40*l.* per annum for 14 years and he suggested that the plaintiff should write that letter, as the plaintiff did. It was suggested to Mr. Beard in cross-examination that this telephonic conversation did not take place; but the plaintiff did not give evidence. Mr. Beard said that on October 5 a formal reply was sent by the defendants.

Judge Bensley Wells said that before September 21 it was clear that every term had been orally agreed between the parties except that as to the payment of the premium: and he was satisfied that there was an oral agreement on September 28 for a 14 year lease as from September 29. No doubt if either party had chosen at that time to go back on what had been agreed he could have done so with impunity; but there was that oral agreement. In his opinion the lease was a grant for a term of 14 years within the meaning of s. 8, sub-s. 3, of the Act of 1920, as amended, and he gave judgment for the defendants, both on the claim and on the counterclaim.

The plaintiff appealed.

Beney K.C. and *Phineas Quass* for the plaintiff. The issue here is whether this lease which was executed on January 7, 1949, of this flat; "to hold unto the tenant from the 29th day "of September, 1948, for the term of 14 years (determinable "as hereinafter mentioned)," was "the grant, renewal or "continuance for a term of 14 years or upwards of any tenancy" within the meaning of sub-s. 3 of s. 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended (1). If it was not such a grant, by the terms of

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 8, sub-s. 1, as amended, with regard to a new control dwelling-house, by sch. 1 to the Rent and Mortgage Interest Restrictions Act, 1939: "A person shall not, as a

sub-s. 1 of s. 8 the premium was prohibited and the plaintiff was entitled to succeed on his claim for 140*l*., the part of this premium which he had paid, and the defendants must fail on their counterclaim for 560*l*., the balance of the premium. It is submitted that the premium was payable on the grant of a tenancy for less than 14 years, by the length of the period from September 29, 1948, to January 7, 1949. The term of the lease was measured from September 29, 1948, but the only interest granted was from January 7, 1949: see the *Earl of Cadogan* v. *Guinness* (1), and the judgment of Clauson J. in that case (2), following *Shaw* v. *Kay* (3). The grant of the lease dates from its execution. As Parke B. said in that case (4): "It was laid down by Eyre C.J., in "*Wyburd* v. *Tuck* (5) as a point upon which there could be "no doubt, that 'the habendum of the plaintiff's lease can "'only be considered as marking the duration of his interest, "'and its operation on a grant is merely prospective'."

That, however, was not the point on which the county court judge decided this case against the plaintiff. He gave judgment for the defendants, both on claim and counterclaim, on the ground that before September 29, 1948, namely, on September 28, 1948, there was an oral contract between

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"condition of the grant, renewal, "or continuance of a tenancy or "sub-tenancy of any dwelling "house to which this Act applies, "require the payment of any "fine, premium, or other like "sum, or the giving of any "pecuniary consideration, in "addition to the rent, and, where "any such payment or consideration has been made or "given in respect of any such "dwelling house under an "agreement made after the 1st "September, 1939, the amount "or value thereof shall be recoverable by the person by whom "it was made or given . . . ." Sub-section 2: "A person "requiring any payment or the "giving of any consideration in "contravention of this section "shall be liable on summary "conviction to a fine not "exceeding one hundred pounds, "and the court by which he is "convicted may order the amount "paid or the value of the "consideration to be repaid to "the person by whom the same "was made or given, but such "order shall be in lieu of any "other method of recovery "prescribed by this Act." Sub-section 3: "This section "shall not apply to the grant, "renewal or continuance for a "term of fourteen years or "upwards of any tenancy."

Section 8 was repealed by s. 2, sub-s. 7, of the Landlord and Tenant (Rent Control) Act, 1949.

(1) [1936] Ch. 515.

(2) Ibid. 517–8.

(3) (1847) 1 Exch. 412.

(4) Ibid. 413.

(5) (1799) Bos. & P. 458, 464.

the plaintiff and the defendants for the grant of this lease as from September 29, 1948, i.e., for fourteen years from that date and for the payment by the plaintiff of this premium by a present payment of 140*l*. and fourteen yearly instalments of 40*l*., as required by the defendants. But there was in fact no concluded contract between the parties on September 28, 1948, since Mr. Beard, the managing director of the defendant company, wrote to the plaintiff on September 17: "I shall "be glad if you will confirm that the terms quoted are "acceptable to you, before the next board meeting, when I "have to report on this case. You will appreciate that if "the terms are not acceptable, the offer must be withdrawn." No doubt Mr. Beard gave evidence in the county court that he had taken the responsibility of agreeing that the amount of the premium should be 700*l*. and that it should be payable by the plaintiff in this way. But the contract was to be with the company and when Mr. Beard writes to the plaintiff on October 5, 1948, giving the agreement of the board, he writes for and on behalf of the defendant company. There was therefore no oral contract between the plaintiff and the defendant company on September 28, 1948.

[*Gray K.C.* for the defendants. I am told that Mr. Beard said in evidence that at the time of his conversation with the plaintiff on September 28, 1948, he had authority to bind the board.]

There was no evidence before the judge that there was any concluded oral contract between the plaintiff and the defendant company on September 28, 1948.

Even if there were such an oral agreement, there was here no grant of a tenancy for the term of 14 years within the meaning of sub-s. 3 of s. 8. Further it appears that the provision in para. 6 of the lease making the balance of the premium immediately due and payable in the event of the plaintiff assigning his lease, was inserted into the lease after September 29, 1948. And, indeed, it may well be that other terms in the written lease, not yet agreed between the parties were inserted in the lease, after September 29, 1948.

Gray K.C. and *G. R. Lawrence* for the defendants. The editor of Woodfall's Law of Landlord and Tenant (24th ed.), writes at p. 213 of the habendum of a lease: "Its operation "as a grant is merely prospective from the time of the "execution of the lease: the term is then first created:

" *Jervis* v. *Tomkinson* (1), *Shaw* v. *Kay* (2), and *Wyburd* v. " *Tuck* (3); but the duration of it is to be computed from the " day in that behalf mentioned in the habendum: *Bird* " v. *Baker* (4)." In *Shaw* v. *Kay* (2), Parke B. twice intervened to state that the date anterior to the lease from which the habendum stated the premises were to be held was material as defining the duration of the term. He said: " The date merely defines the duration of the term," and again " the habendum of the plaintiff's lease can only be " considered as marking the duration of his interest and its " operation as a grant is merely prospective." That sentence is to be found in the judgment of Eyre C.J. in *Wyburd* v. *Tuck* (3). A lease habendum from the Lady Day then next last past shall in respect of time be computed from that day, though it does not commence in interest till the day of its date: *Mayn* v. *Beak* (5). But the duration of the term is exactly the matter with which the court is here concerned. The question is: What is the date from which the lease runs? Parke B. answered that question in favour of the defendants on good authority: *Bird* v. *Baker* (4) is decisive in favour of the defendants. But it is submitted that the reasoning of Clauson J. in *Earl of Cadogan* v. *Guinness* (6) is wrong. The term here began on September 29, 1948, and its duration was for 14 years: see the judgment of Pollock C.B. in *Jervis* v. *Tomkinson and Others* (7).

On the second question, there is no doubt that both parties intended that the lease should be for a term of 14 years—by the plaintiff because he wanted a lease which he could assign and he could not get the lease without paying this premium which required a lease for the term of 14 years, and by the defendants because they wanted to charge a premium not prohibited by law. The county court judge has found, on the evidence of Mr. Beard, that there was an oral agreement between the parties, for the grant of the lease for the term of 14 years with the term that the plaintiff should pay this premium, made before September 29, 1948. No doubt neither party could have obtained specific performance of that agreement; but there was this oral agreement and there was, in fact, complete performance of it. The requirement for this premium was made on the plaintiff by the

(1) (1856) 1 H. & N. 195.
(2) 1 Exch. 412.
(3) 1 Bos. & P. 458, 464.
(4) (1858) 1 E. & E. 12.
(5) (1596) Cro. Eliz. 515.
(6) [1936] Ch. 515, 517–8.
(7) H. & N. 195, 207.

defendants before September 29, 1948, and it was agreed to and accepted by the plaintiff before that date. It is immaterial if a new term of the lease was agreed after September 29, 1948, as to the mode or time of payment of the premium. The parties made provision before September 29, 1948, for the grant of a lease to the tenant for a period of 14 years, one term being the payment by the tenant of this premium of 700*l*. and the condition in the lease for the premium related back to the original requirement for the premium made by the landlords.

Phineas Quass in reply. In view of Mr. Beard's letter of September 17, 1948, and the letter he wrote on behalf of the company on October 5, 1948, there was no evidence on which the county court judge could find that there was an oral agreement between the parties, made before September 29, 1948, that this lease should be granted for 14 years, the plaintiff paying the premium. This was a lease for 13¾ years.

BUCKNILL L.J. I will ask Jenkins L.J. to give the first judgment.

JENKINS L.J. The question in this case is whether the premium was lawfully charged, having regard to the provision of s. 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 3, sub-s. 1, of and sch. I. to the Rent and Mortgage Interest Restrictions Act, 1939, with regard to new-control houses. The section prohibits, under penalty, the requiring of any premium as a condition of the grant, renewal or continuance of a tenancy or sub-tenancy other than the grant, renewal or continuance for a term of 14 years or upwards of any tenancy. Unless in a given case the premium falls within the exception, it can be recovered by the party by whom it has been paid and there is the penal provision that a person requiring any payment or the giving of any consideration in contravention of the section shall be liable on summary conviction to a fine not exceeding one hundred pounds.

The lease in this case is expressed to be a lease for the term of 14 years but it is dated January 7 1949, and is expressed to be for 14 years from September 29, 1948. It therefore may be said to be a lease substantially for 13¾ years only if the term is to be measured from January 7, 1949, and not from the past date, from which the term is expressed to run.

C. A.

1949

COLTON
v.
BECOLLDA
PROPERTY
INVEST-
MENTS
LD.

Jenkins L.J.

It is that fact which has given rise to the present litigation. The plaintiff has had the happy thought that, inasmuch as this lease was granted for 14 years computed from a date about three months before the date of the lease, it follows that the premium of 700*l.* is a premium which has been charged in respect of a lease being a lease for less than 14 years, and therefore not within the exception to the provision of s. 8, sub-s. 1, contained in the third sub-section; and, therefore, the premium, as he contends, is unlawfully charged and he is entitled to recover it. On those grounds he brought the present proceedings, claiming the 140*l.* which he had already paid, whilst the defendants' counterclaim for 560*l.*, the balance of the premium of 700*l.*, on the ground that the plaintiff has assigned the flat in breach of para. 6 of the lease.

Two questions really arise on the appeal. The first is whether it is necessary for a lease, in order to qualify for exemption under s. 8, to be a lease for the full period of 14 years beginning at a date on or after the date on which the lease is executed, or whether a lease is exempt if it is expressed to be for 14 years although the term runs from a date anterior to the actual granting of the lease. That is the first point, and if the plaintiff were wrong in his contention on this issue, that would suffice to dispose of the whole appeal. However, assuming him—without for the moment expressing an opinion—to be right on that, there is this further point. The defendants contend that in any case the lease was granted pursuant to negotiations which took place before September 29, 1948, and resulted before that date in a substantially concluded oral agreement for the grant of a lease for 14 years from September 29, 1948. The defendants say that on the facts thus summarized there has been no offence against s. 8, because all the defendants did was to say that they would grant the plaintiff a lease for 14 years from a future date, namely, September 29, 1948, on condition that he should pay them a premium of 700*l.*; the premium, therefore, was, in the language of the section, required as a condition of granting a lease which was clearly a lease for a full 14 years commencing after the date when payment of the premium was required as a condition for granting the lease. That contention of the defendants, which is disputed by the plaintiff both on the facts, as I understand it, and as a matter of law, turns on a consideration of the evidence and some of the correspondence which has been put in.

Before I come to that I will dispose of the first point. It seems to me to be reasonably plain that, where there has been no antecedent agreement or negotiation concerning the grant of a lease and the payment of a premium for granting it, and there is nothing in the case except the lease itself, a lease for the term of 14 years expressed to commence from a date anterior to the lease is not a lease satisfying s. 8, or coming within the exemption allowed by s. 8 as being a lease for 14 years. We were referred to a number of authorities on the point, and in particular to the decision of Clauson J., as he then was, in *Earl of Cadogan* v. *Guinness* (1). That was a case under s. 84, sub-s. 12 of the Law of Property Act, 1925, which concerns the discharge or modification of restrictive covenants affecting land, and gives power to the relevant authority to deal with matters of that kind on the application of any person interested, but applies to leaseholds as opposed to freeholds only where the term created was one of more than 70 years; and 50 years of the term have expired. Precisely the same point arose in that case as the application related to leases granted for more than 70 years from dates anterior to the dates of the leases. The learned judge said (2): "It is a very common experience that in the "creation of leasehold interests the term which is created "is expressed to run as from a date anterior to the date of the "document which creates the term. It is very common "indeed to find a lease in the year 1936 creating a term of "21 years as from December 25, 1935. If in such a lease "there is a reference to, let us say, the first seven years of the "term, or 'of the said term,' then for the purpose of calculating "which are the first seven years, no doubt, on the true "construction of the document, the seven years should be "treated as beginning from December 25, 1935, and not "from the date, let us say, in March, 1936, when the document "was actually executed. But it must be borne in mind "that it is not possible by a deed executed in March, 1936, "to create a term in such a sense as that it shall bring into "existence a term before the date of the execution of the deed. "Although it is spoken of as a 21 years' term, the term, in fact, "is 21 years less the period which elapses from December 25, "on which the term nominally begins, to the date of the "execution of the deed. That seems to me an obvious "proposition." Then the learned judge referred to the case of *Shaw* v. *Kay* (1), in which the proposition thus propounded by him had been adopted. Applying that judgment to the present case, the term of the lease here in question was measured from a past date, so that September 29, 1948, was its commencement for the purposes of measuring its duration; but in point of interest, the only interest it granted was 14 years less the period between September 29, 1948, and January 7, 1949, which had already elapsed before the date on which it was actually granted. It follows, I think, that if the matter depended on the lease alone the premium would be an unlawful premium. We were referred to a number of other cases on the same point, but I do not propose to take up time in citing them here. The discussion can be obscured by referring to cases apparently inconsistent with the conclusion to which I have come, but that is really to be explained by the fact that in each case the matter depends on the construction of the particular document and on the nature of the particular provisions in question. I am satisfied that, for the purposes of s. 8 of the Act of 1920, this lease, considered by itself, could not be regarded as a lease for the full period of 14 years.

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(1) [1936] Ch. 515.

(2) Ibid. 517.

But the matter does not rest there, and I pass now to consider the defendants' contention as to the effect of the antecedent negotiations. The defendants are the owners or lessees of Elsworthy Court, and in 1939, No. 3, the flat comprised in the lease here in question, was let to a Mr. Hellyar on a contractual tenancy. It appears that Mr. Hellyar assigned the residue of his interest in that tenancy to the plaintiff, who paid rent quarterly in advance; and the tenancy was apparently determinable by appropriate notice. The defendants in fact gave the plaintiff a notice to quit on March 25, 1948, and thereafter he continued to pay a quarterly rent. There was some discussion before us and in the court below whether in those circumstances he was a statutory tenant or a tenant holding over on a new tenancy to be inferred from the continued receipt of rent. The judge came to the conclusion that he remained in possession as a statutory tenant, and for my part I see no reason to differ from that conclusion.

It seems that, in or about August, 1948, the plaintiff was negotiating with the defendants for a new tenancy, and one finds him writing on August 19, 1948, to the defendants

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(1) 1 Exch. 412.

C. A.
1949
Colton
v.
Becollda
Property
Invest-
ments
Ld.
Jenkins L.J.

in these terms: "I understand from Mr. Lewis that you "desire to go into the question of a fresh lease for the above "premises. I shall be obliged for an appointment to discuss "this matter." Then that was acknowledged on September 9, proposing an appointment to meet and discuss the matter. Apparently by September 17, there had in fact been a meeting.

[His Lordship then read the letters of September 17, 18, 21 and 28 set out earlier in this report and continued:] At this point it is necessary to refer to the oral evidence given at the trial in the county court. The only witness was Mr. Beard, the chairman and managing director of the defendants. No evidence was called on the other side. According to the judge's note, Mr. Beard said that when he received the plaintiff's letter of August 19 the interview followed on September 14, and he (Mr. Beard) said that the defendants would grant security of tenure in the shape of 14 years' lease at a rent of 190*l.* plus increased rates and water rates. The judge's note continues: "Premium of 850*l.* "was what I asked. Plaintiff 700*l.* (200*l.* in cash, balance "100*l.* per annum)." Mr. Beard accepted this offer and asked him to confirm it. He then received the letter of September 18. Then comes this important passage: "28th September. Plaintiff telephoned to me and said "he could not do better than his offer of 140*l.* and 40*l.* per "annum. I said: 'I take the responsibility of agreeing "'that in order to get it settled'." Then in cross-examination he said: "The letter of September 28 was written by plaintiff "at my suggestion, when we had the telephone conversation "of September 28," so that according to Mr. Beard's evidence the letter of September 28, which I have already read, although it was simply a request on the face of it by the plaintiff that his offer should be put before the board, followed on the telephone conversation at which he (Mr. Beard) had agreed the terms. The reply to the letter of September 28 was not written until October 5, the reason for that being said to be the date of the next board meeting. [His Lordship then read the letter of October 5 set out earlier in this report and continued:] The correspondence went on and ultimately on January 7, 1949, the lease was executed.

The question, on this part of the case, is whether the parties had, before September 29, 1948, reached such a measure of agreement that it can fairly be said that the premium in

C. A.
1949
Colton
v.
Becollda
Property
Invest-
ments
Ld.
Jenkins L.J.

question was required by the defendants as a condition of their granting a lease to him of the premises for 14 years from September 29, 1948, being a then future date. In my judgment, if the facts fairly support that conclusion, the section has not been infringed. I think, on the language of the section, one must look at the facts and see when the premium alleged to be an illegal premium was required, and what it was required for; and if one finds a preliminary agreement for a lease for 14 years from a future date, one of the terms of which is that the intending lessee shall pay a premium, then it seems to me that within the meaning of the section the premium has been required in respect of a lease of the exempted character, namely, a lease for a period of 14 years. Once I find that in the case, it matters not, in my judgment, that the formal completion of the transaction by a lease under seal is for one reason or another delayed so that part of the 14 years' term the parties were negotiating about has in fact expired before the lease is actually executed. The contrary was argued for the plaintiff, but I cannot accept that argument. It seems to me to be perfectly monstrous to construe this penal section as applying, for example, to a case where the parties have clearly and unambiguously agreed in correspondence for a lease for 14 or more years, and the lessee has gone into, and remained in, possession under that agreement, but the formal lease has not been executed for perhaps two or three months. In such circumstances as those, it would be plain that the premium would have been demanded for the full term of 14 years or more to which the agreement related, and not in respect of the residue of that term which remained unexpired when the formal document was executed.

The county court judge who, as I have said, heard the evidence of Mr. Beard, the only witness called, accepted the whole of it. He said in his judgment: "It is, I think, "clear that everything had been orally agreed except how "the payment of the premium should be made. On "September 21, Mr. Beard wrote to the plaintiff suggesting "that the plaintiff should pay the 700*l.* premium by 150*l.* "down and 50*l.* per annum. The plaintiff did not reply "in writing but on September 28, he telephoned to Mr. Beard "and said he could not improve upon his offer of 140*l.* down "and 40*l.* per annum. It was suggested in cross-examination "that this telephone conversation did not take place; the "plaintiff has not gone into the witness box and I accept

"Mr. Beard's evidence in toto. Mr. Beard says that at that "telephone conversation he told the plaintiff he took the "responsibility of accepting the plaintiff's offer of 140*l*. down "and 40*l*. per annum for 14 years, and he suggested that "the plaintiff should write the letter of September 28, 1948. "A formal reply to that letter was sent by the defendants "on October 5. I am satisfied that there was an oral "agreement before September 29 for a 14 years' lease from "September 29; but, no doubt, if either party had chosen "at that time to go back upon what had been agreed, he "could have done so with impunity. But there was that "oral agreement." That is the judge's finding of fact and it is a finding which, on the uncontradicted evidence of Mr. Beard, must be given due weight. It has been criticized as being inconsistent with the correspondence, and I agree that it is not easy to understand why the plaintiff's letter of September 28, 1948, should have taken the form it did take if, indeed, there had been an agreement between Mr. Beard and the plaintiff made orally before that letter was written. But letters are not always framed in the most appropriate language possible, and it must be remembered that the judge saw and heard Mr. Beard and accepted his evidence.

I think the fair conclusion is that in the conversation of September 28, Mr. Beard did reach agreement with the plaintiff, subject to confirmation by his board, and, as that confirmation was in the result forthcoming, it seems to me that one can for this purpose treat the agreement between the plaintiff and the defendants as having been reached on September 28, 1948. Accordingly, in my judgment, this premium does not offend against the provisions of s. 8 of the Act of 1920, because it was required as a condition to the granting of a lease of the excepted description, that is to say, a lease for a term of 14 years measured from a future date, namely, September 29, 1948.

A section of this sort, with its penal consequences, must be given a reasonable construction. It is very common practice for leases and renewals of leases to be agreed upon on the footing that they are to take effect from a given future date, and for the formal documents not to be executed for some time afterwards. Therefore, I think that each case that is said to infringe the section must be looked at, and the question in each case must be whether on the facts the premium which is attacked has been required as a condition of the grant of a tenancy for a term of less than 14 years. Regarding this case from that point of view, I am satisfied that nothing done here has infringed the section. I am accordingly of opinion that the appeal fails as regards the plaintiff's claim. In my judgment, it follows that, as the premium is not an illegal premium, the defendants are entitled to recover the balance in accordance with the tenor of the lease, which it will be remembered made the whole balance of the premium payable in the event which has now happened of the plaintiff assigning the lease.

Something was made for the plaintiff of the fact that this provision on which the counterclaim is founded, that is to say, the provision making the whole of the balance of the premium immediately due and payable in the event of assignment, was imported into the lease on some date after September 28. That seems to me to be irrelevant in the circumstances. The material question is whether the premium of 700*l.* was an illegal premium. For the reasons I have stated, I hold that it was not, because it was required as a condition for the grant of a tenancy agreed to be granted for a period of 14 years wholly in the future. That being so, it was a legal premium, and, if it was, I see no reason why the parties should not alter subsequently, in settling the final form of the lease, the mode in which the premium was to be paid. For these reasons, I am of the opinion that this appeal fails and should be dismissed.

BUCKNILL L.J. I will ask Denning L.J. to give the next judgment.

DENNING L.J. In August, 1948, Mr. Colton was a statutory tenant of this flat. So long as he remained a statutory tenant he was, of course, unable to assign his interest to anyone; but, if he could get a contractual tenancy, he would be able to assign it at a price beneficial to himself. Being desirous of assigning, therefore, he asked the landlords for a fresh lease; and the landlords said that they would be prepared to grant him one for 14 years at the standard rent provided that he paid a premium for it. Nothing less than 14 years would do because the Act prohibited any premium on a lease for less than 14 years. Negotiations ensued and were practically concluded on September 28, 1948. Subject to the approval of the board of the landlord company, Mr. Colton was to get a new lease for 14 years at a premium of 700*l.*

At the same time he was negotiating with a proposed assignee for an assignment of that lease. In January, 1949, a lease was granted to Mr. Colton for 14 years from September 29, 1948, and he assigned it to a purchaser. But Mr. Colton now turns round and says that he is not liable to pay the premium of 700*l.* to the landlords, and he claims back such part of it as he has already paid. He says that the landlords, by taking the premium, have acted unlawfully. His contention is that the lease was not a lease for 14 years, because, although the negotiations took place before the 14 years started, the execution of the lease did not take place till some three months after the 14 years started.

The validity of this contention can be tested by taking a case where a proposed tenant, who is out of possession, is negotiating with a landlord for a long lease. It continually happens that the tenant goes into occupation whilst the negotiations are still pending and before the lease is executed, and then, afterwards, when the lease is drawn up, it is expressed to start as from the date the tenant went into occupation. In such cases, in point of law the legal interest of the tenant starts from the date when the lease was executed: *Earl of Cadogan* v. *Guinness* (1). But as between the parties it may start from the date stated in the lease, because the parties, by their agreement, have related its commencement back to the date when the tenant went into occupation. This relation back is not to be regarded as a nullity; it may often mean that the conditions and covenants of the lease relate back to that time also. Whether they do so or not depends on the true construction of the lease. The cases of *Shaw* v. *Kay* (2) and *Jervis* v. *Tomkinson and Others* (3), turned on the construction of the leases there in question. Suppose, then, in the case I have put, that, before the proposed tenant went into occupation, the landlord had stipulated that when the lease was granted a premium should be payable; and suppose that afterwards, when the lease was executed, it did provide for the premium. In such a case the condition in the lease requiring the premium, would relate back, in my opinion, to the original requirement made in the negotiations before the tenant went in. There would be no breach of the Act because the effective requirement was made before the 14 years started. Similarly, in the present case the landlords required the

(1) [1936] Ch. 515.

(2) 1 Exch. 412.

(3) 1 H. & N. 195.

premium on September 28, 1948, before the 14 years started. They have, therefore, not infringed s. 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The plaintiff cannot recover back his 140*l*., and he is liable on the terms of the lease for the 560*l*. for which the defendants counterclaimed. No such problem can occur in future because s. 8 is repealed by s. 2, sub-s. 7, of the Landlord and Tenant (Rent Control) Act, 1949. I agree that the appeal should be dismissed.

BUCKNILL L.J. I agree. The only difficulty I have had in the case is, that if a lease which is executed on a certain date is said to start at a very substantially earlier date, one might find a way of defeating s. 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Act of 1939 in the case of a new-control house. But in this case the judge has said, and I think all the evidence bears it out, that there has been no suggestion that what was done in this case was a mere colourable device on the part of the defendants to obtain a premium. On the evidence I am satisfied that no such suggestion could be made.

The question of fact was whether there was an oral arrangement made before September 29, 1948, between the plaintiff and the managing director of the defendant company to grant a lease of 14 years on the payment of this premium. The judge has found that there was an oral agreement of that kind made, and I think that there is evidence on which he could properly come to that conclusion. Not a legal agreement, maybe, but a sufficient agreement, a gentleman's agreement, at any rate; and both parties proceeded upon that footing that an arrangement of that kind had been made before September 29, 1948. This being so, on the question of law, I agree that there was no breach by the defendants of s. 8 of the Act of 1920. I think that s. 8, which imposes a penalty which may be substantial, ought to be read in a liberal and common-sense way. There has been no breach of the terms of s. 8 and the plaintiff failed on his claim for the return of that part of the premium which he had paid, and the defendants established their right to the balance of the premium on breach by the plaintiff of the terms of para. 6 the lease.

There has been some criticism of the plaintiff who did not give evidence and explain the whole history of his position as regards the flat. It may be fair to state that it seems from the correspondence that the plaintiff paid a large premium for the assignment to him of a lease of this flat in 1947 and two months after the assignment, the defendants gave the plaintiff notice to quit the flat on March 25, 1948. From that date the plaintiff was only a statutory tenant. He then started these negotiations with the defendants. The appeal must be dismissed.

C. A.
1949
COLTON
v.
BECOLLDA
PROPERTY
INVEST-
MENTS
LD.
Bucknill L.J.

Appeal dismissed.

Solicitors for the plaintiff: *A. L. Dollond & Co.*

Solicitors for the defendants: *Cooper, Bake, Fettes, Roche and Wade.*

C. G. M.

Considered. BODDINGTON *v.* WISSON [1951] 1 K. B. 606

KESTELL *v.* LANGMAID.

C. A.
1949
Oct. 25, 26.
Evershed M.R., Somervell L.J. and Hodson J.

Landlord and tenant—Agricultural holding—Notice to quit served by landlord—Consent of Minister of Agriculture not obtained—Tenant quits in consequence of notice—Tenant entitled to compensation—Agricultural Holdings Act, 1927 (13 *&* 14 *Geo.* 5, *c.* 9), *s.* 12*—Defence* (*General*) *Regulations,* 1939 (*St.R. & O.* 1939, *No.* 927), *reg.* 62, *para.* 4A.

The Defence (General) Regulations, 1939, by reg. 62, para. 4A, provided that where an agricultural holding has been sold pursuant to a contract for sale made since September 3, 1939, any notice to quit given to the tenant expiring after 1941 "shall be null "and void: provided that this paragraph shall not apply to any "notice if, ... the Minister of Agriculture and Fisheries "consents in writing thereto."

The landlords had purchased an agricultural holding in 1942 subject to a yearly tenancy. On September 22, 1945, they served notice to quit on the tenant expiring on September 29, 1946 The landlords did not apply for or obtain the consent of the Minister to the service of that notice pursuant to reg. 62, para. 4A. The tenant, however, did quit the holding in consequence of the service of that notice and he claimed compensation for disturbance pursuant to s. 12 of the Agricultural Holdings Act, 1923. The landlords contended that as the Minister's consent had not been obtained to the service of the notice pursuant to reg. 62, para. 4A, the notice was "null and void" and accordingly the tenant was not entitled to compensation under s. 12 of the Act of 1923. The county court judge decided in the tenant's favour.

Held, dismissing the appeal, that the phrase "null and void" in reg. 62, para. 4A, was not sufficient to justify the court holding that the principle laid down in *Westlake* v. *Page* [1926] 1 K. B. 298 ought not to be applied. If a notice to quit is given, whether it is a good or bad notice, and it is accepted as a good notice by the tenant, the case falls within s. 12 of the Agricultural Holdings Act, 1923, and the tenant is entitled to claim compensation under that section.

Westlake v. *Page* [1926] 1 K. B. 298, followed.

APPEAL from Bodmin county court upon a special case stated by an arbitrator under the Agricultural Holdings Act, 1923.

In May, 1937, Mark Langmaid acquired a yearly Michaelmas tenancy of an agricultural holding known as Polgreen Farm, Saint Veep in Cornwall. Early in 1943 T. C. H. D. Kestell and E. Kestell purchased this agricultural holding subject to the yearly tenancy. Shortly before September 29, 1943, the landlords served notice to quit on the tenant. They applied to the Minister of Agriculture pursuant to the provisions of reg. 62, para. 4A, of the Defence (General) Regulations, 1939, for his consent to that notice. He withheld his consent and the notice was accordingly null and void. Prior to September 29, 1944, the landlords again served notice to quit and the Minister again withheld his consent, with the result that in this case also the notice to quit was null and void.

On September 22, 1945, the landlords served a further notice to quit on the tenant expiring on September 29, 1946. In such notice they stated that it was served as possession of the holding was required by the landlords for their own occupation. The landlords in this case did not apply for the Minister's consent under reg. 62, para. 4A. The tenant purchased another business in 1945. On August 19, 1946, he served on the landlords notice of intention to claim compensation for disturbance and on August 29, 1946, he served notice of intention to remove fixtures and he vacated the holding on September 29, 1946.

The arbitrator under the Agricultural Holdings Act, 1923, submitted a special case to the court to determine whether where reg. 62, para. 4A, of the Defence (General) Regulations, 1939, applied and the landlords failed to obtain the approval of the Minister and the notice was accordingly "null and "void," under that regulation, the notice was effective for the purpose of giving the tenant a right to claim compensation pursuant to s. 12 of the Agricultural Holdings Act, 1923. The county court judge found in favour of the tenant.

The landlords appealed.

N. E. Wiggins for the appellants, the landlords. The question here turns on s. 12 of the Agricultural Holdings Act, 1923 (1), which gives the tenant of an agricultural holding compelled to leave as the result of notice to quit served by his landlord a right to compensation, and reg. 62, para. 4A, of the Defence (General) Regulations (2), which made any such notice to quit without the leave of the Minister " null and " void." Here the landlords having twice failed to get leave, gave a notice to quit to the tenant without asking for the Minister's leave. The tenant having acted on that notice is not, it is contended, entitled to compensation under s. 12. It is said that the notice could be validated after it was given but in practice the Minister does not give his consent more than a year after notice to quit is given. It is contended that compensation can only be recovered when there is a valid notice to quit and here the notice to quit was null and void.

[EVERSHED M.R. Does it lie in the mouth of the landlord to say he has given an invalid notice to quit? It seems to be a most cynical attitude.]

The tenant having given up possession in consequence of a notice to quit that is null and void cannot recover compensation under s. 12: see *Fox* v. *Neal* (3).

The notice is null and void for all purposes. It is not like the case where a landlord gives too short a notice so that it is invalid. A provision making a notice " null and void " is far stronger than where a notice is rendered merely invalid. Anything made " null and void " is of no effect at all. An invalid notice may be merely voidable.

(1) Agricultural Holdings Act, 1923, s. 12: " (1.) Where the " tenancy of a holding terminates " by reason of a notice to quit " given by the landlord, and in " consequence of such notice the " tenant quits the holding, then," in the absence of certain matters therein referred to, the tenant is entitled to obtain compensation for disturbance.

(2) The Defence (General) Regulations, 1939, reg. 62, para. 4A: " Where the whole " or any part of an Agricultural " holding is subject to a contract " for sale made since September 3, " 1939, or has been sold in pur" suance of a contract for sale " made since that date, any " notice to quit that holding or " any part thereof given to the " tenant so as to expire at any " time after the end of the year " 1941 shall be null and void: " Provided that this paragraph " shall not apply to any notice " if (whether before or after the " giving thereof) the Minister of " Agriculture and Fisheries con" sents in writing thereto."

(3) (1924) 13 L. J. (C. C. R.) 11.

C. A.

1949

Kestell
v.
Langmaid.

[Somervell L.J. referred to *Lloyds Bank Ld.* v. *Elliott* (1). *Streat* v. *Cottey* (2) contains a decision exactly contrary to that in *Fox* v. *Neal* (3). He also referred to *Blay* v. *Dadswell* (4).]

H. E. Park for the respondent was not called upon.

Evershed M.R. This is an appeal from a judgment of Judge Scobell Armstrong upon a special case submitted to the court by the arbitrator under the Agricultural Holdings Act, 1923. The material facts are set out in the special case, and I do not propose to canvass the whole of them in this judgment. I think the point is raised sufficiently clearly by the question of law submitted by the arbitrator, which is this: "The question of law upon which I now ask the opinion "of this honourable court pursuant to para. 10 of sch. II. "of the Agricultural Holdings Act, 1923, is 'where reg. 62, "'para. 4A, of the Defence (General) Regulations, 1939, is "'applicable to a notice to quit and the landlords fail to "'apply for the approval of such notice by the Minister "'and such notice is therefore, according to the regulation, "'"null and void," but the tenant nevertheless quits on "'the date named in such notice, in consequence of such "'notice, is such notice effective for the purpose of giving "'to the tenant who has quitted a right to claim compensation "'for disturbance pursuant to s. 12 of the Agricultural "'Holdings Act, 1923, assuming that the tenant on his part "'has observed all proper legal formalities in connexion "'with his claim for compensation?'" Having read the question, I think it will next be convenient to turn to s. 12 of the Act of 1923, under which the claim for compensation arises. It is a very long section, but it is only necessary to read a short piece of it. The first sub-section is as follows: "Where the tenancy of a holding terminates by reason of "a notice to quit given by the landlord, and in consequence "of such notice the tenant quits the holding, then," in the absence of certain matters referred to, "the tenant is entitled to obtain compensation for disturbance."

Mr. Wiggins has pointed out in what I may describe, if he will allow me, as a very clear and forceful argument, that there are two conditions stated in the section, the satisfaction of both of which is required to give rise to the claim for

(1) [1947] 1 All E. R. 79.

(2) (1947) 14 L. J. N. C. C. R. 156.

(3) 13 L. J. C. C. R. 11.

(4) [1922] 1 K. B. 632.

compensation. The first is that the tenancy terminates by reason of a notice to quit given by the landlord, and the second is that the tenant, in consequence of such notice, quits the holding.

It will be observed from the form of the case which I have read that, so far as we are concerned, we must assume that the second condition is fulfilled, for, as a fact, the arbitrator has found, and his finding is part of the question submitted, that the tenant here did quit in consequence of the notice. But that still leaves the question to be determined: Was the tenancy terminated by reason of the notice to quit?

The tenant in the court below placed his case on two grounds: first, that on the true interpretation of the Act, the first condition, like the second, was satisfied; in other words, not only that he, the tenant, quitted the premises in consequence of the notice, but that his tenancy was terminated by reason of the notice, secondly, he alleged that in any event the landlord here was estopped or otherwise was disabled from alleging or asserting the invalidity of his notice; and the other facts referred to in the special case might have been relevant to a consideration of that second point, the question of estoppel or some analogy to estoppel.

The county court judge decided in the tenant's favour, and I think rightly so decided, on the first point, and therefore did not go on to consider the estoppel question. We, taking the same view as the county court judge, have also thought it unnecessary to pursue the estoppel matter, and we have therefore heard no argument upon it. I propose to say no more upon it and not to refer to facts which can only be relevant to it.

Having read the section of the Act, I pass now to reg. 62, para. 4A. [His Lordship read the regulation.] Now Mr. Wiggins has argued that the formula "null and void" is one which leaves no room for any ambiguity whatever; the legislature is saying: "A notice which is embraced within "this Defence Regulation is for all purposes to be regarded "as without any force, validity or effect." If that is right, he says, though the tenant may be found to have quitted the holding because he had in fact received a particular piece of paper, nevertheless you cannot say that the tenant's interest in the land came to an end by reason of something which is, so to speak, wholly proscribed by the law as without any force and effect. I think that there is considerable force

C. A.
1949
KESTELL
v.
LANGMAID.
Evershed M.R.

in that argument, but in considering it this court is not without substantial guidance. I think it will be convenient for me to turn at once to a previous decision of this court in the case of *Westlake* v. *Page* (1). It is true to say, as Mr. Wiggins has said, that the particular point which seems to me to be of the highest significance to us in that case does not obtain any mention in the headnote and, in a sense, is dealt with incidentally in the judgment, though, as I follow the case, the decision on the point that is relevant was necessary to the result at which the court arrived. The facts of the case need only be stated to this extent: The landlord had sought there to obtain possession from his tenant by serving a notice to quit, but in the notice to quit he had added certain words to the effect that if the tenant agreed to certain proposals which he, the landlord, had made as regards the rent, then the landlord would not seek to take advantage of the notice. Nevertheless, when the time came, the tenant did, pursuant to the notice, quit the holding; and it was then claimed by the tenant that a right to compensation under s. 12 had arisen. The landlord thereupon said: "No; this notice "to quit was conditional, and therefore it was a bad notice." The word "bad" I use deliberately, because that is the adjective which was selected by Bankes L.J. The relevant part of his judgment is as follows (2): "The first point "taken by the landlord in this case is a technical one, that "the notice to quit given was in law a bad notice, because "it was conditional, and that under those circumstances "the case does not come within the section"—that is s. 12, which we are now discussing—"at all, for that section when "speaking of a holding being terminated by a notice to quit "must presumably refer to a termination by a valid notice. "I cannot accept that contention. It seems to me that if "a notice to quit is given, whether it be a good or a bad one, "and it is accepted as a good notice by the tenant, who "quits the holding in consequence of it, the case comes "within the language of the section. That technical point "therefore fails." Warrington L.J. dealt somewhat differently with this point but did not indicate any dissent from the general proposition stated by Bankes L.J. Scrutton L.J. said merely that on this point he "agreed with what his "brothers had already said."

It seems to me to follow that in *Westlake* v. *Page* (1), this

(1) [1926] 1 K. B. 298. (2) Ibid. 304.

court, or at least a majority of this court, must be taken to have held that in order that the tenant should be entitled to compensation under s. 12 it was not necessary to prove that the notice to quit, which operated to put an end to the tenancy and in consequence of which the tenant had gone, was a valid notice in the sense that it complied with the contractual position between landlord and tenant.

The question which Mr. Wiggins has argued here is whether that reasoning—that principle—ought to apply, not to an invalidity vis-à-vis the contractual rights, but to something which is by Parliament declared to be null and void. That there is a distinction between the two, at any rate for some purposes, I will not deny. But it seems to me that in construing a section such as this, and in considering the purpose of the section, it would be pessimi exempli to draw fine distinctions of that character unless we were compelled to do so; and it does not seem to me that there is anything in the language of the Defence Regulation or the use of the words " null and void " which compels the court to say that the principle applicable to a notice " bad " in the sense that it failed to comply with the contractual obligation does not apply to a notice bad because it fails to comply with some provision of the Defence Regulation. I agree that the words " null and void " are of the strongest import, and it would be difficult to conceive of any formula to express the quality of badness which was stronger than null and void. At the same time, when one looks at the paragraph, it is, I think, necessary to read those words at least with some reservation. In order that the notice should ever take effect at all, it must, of course, in a case of the type we are dealing with, be a notice expiring at the end of the year and be a year's notice. The Defence Regulation itself contemplates on the face of it that the consent which is required to give effectiveness to the notice and to make the earlier part of the regulation inapplicable, may be given at any time, both before or after the giving of the notice. It is therefore contemplated, whatever the practice of the Minister may be, that a notice given at the beginning of September, 1945, to expire at Michaelmas, 1946, might not get the necessary imprimatur till the summer, or even the beginning of the autumn of 1946.

During the period from the time the notice was served until the consent was given, what would be the position?

C. A.
1949
KESTELL
v.
LANGMAID.
Evershed M.R.

If "null and void" was to be given the widest and most comprehensive significance, it would be difficult, I think, to imagine that it was null and void for nine or ten months and then was suddenly given life and vigour by a consent ex post facto obtained from the Ministry of Agriculture.

I do not wish to pursue that further. I mention it merely in order to support the view that, in my judgment, the use of the phrase "null and void" here is not sufficient to justify the court in saying, or require the court to say, that the principle applicable in the case of *Westlake* v. *Page* (1) ought not to be applied in this case. The language of Bankes L.J. is perfectly general. It seems to me that if a notice to quit is given, whether it be a good or a bad one, and it is accepted as a good notice by the tenant, then the case comes within the language of the section. I decline to say that there are such degrees of badness as would justify the sort of distinction which we are invited to introduce into the matter in this case.

I would further add this; that the language of the section is: "Where the tenancy of a holding terminates by reason "of a notice to quit." It does not say: "Where the tenancy "terminates or is terminated *by* a notice to quit." The difference in language is not one on which I would wish to place any very great emphasis, but there it is, and, if the question be asked as a matter of ordinary English, "By reason "of what did this tenancy terminate?", then it seems to me that on the facts of this case the only possible answer is: "By reason of this document, good, bad or indifferent, namely, "the notice to quit served by the landlord."

Finally, I think that the two conditions, namely, first, the requirement that the tenancy should be terminated by reason of the notice to quit, and, second, that the tenant should quit in consequence, are understandable if the purpose of the section is borne in mind. For it is necessary, if the tenant is to get compensation, that not only should his right as a tenant go, but that he should also quit and leave the premises. Unless both are satisfied, there might be a case in which a tenant holding over or having no contractual right might nevertheless prefer a claim to compensation while he still remained in fact in possession.

The result, therefore, is that in my judgment, the view taken by the county court judge was correct. He referred to another case—another decision by a county court judge—*Fox*

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(1) [1926] 1 K. B. 298.

v. *Neal* (1), in which the view of the county court judge who was then concerned differed from that of Judge Scobell Armstrong. We have looked at that case, and also at another decision—the case of *Streat* v. *Cottey* (2)—in which the point was also raised and came before a third county court judge sitting at Honiton. In the last named case, the learned judge came to a conclusion, contrary to that of *Fox* v. *Neal* (1), and in line with that which commended itself to Judge Scobell Armstrong. In my judgment, the view taken by Judge Scobell Armstrong and by the judge in the case of *Streat* v. *Cottey* (2) is to be preferred to the view taken in the case of *Fox* v. *Neal* (1), and I think, as I have already indicated, that the decision of the court below was correct and that this appeal accordingly fails.

SOMERVELL L.J. I agree that this appeal fails. I agree, for the reasons that have been given, that this case is covered by the reasoning in *Westlake* v. *Page* (3). I only want to add this: While, on that view, I think we are bound by the authority, I wholly agree with the conclusion, if I may say so, that was come to in that case.

HODSON L.J. I also agree and have nothing to add.

Appeal dismissed.

Solicitors: *Hyde, Mahon and Pascall, for John Pethybridge, and Son, Bodmin; Barlow, Lyde and Gilbert, for Stephens and Scown, St. Austell.*

(1) 13 L. J. (C. C. R.) 11.
(2) 14 L. J. (N. C. C. R.) 156.
(3) [1926] 1 K. B. 298.

B. A. B.

MINNS *v.* MOORE.

C. A.
1949
Oct. 26, 27.
Evershed M.R., Somervell L.J. and Hodson J.

Landlord and tenant—Rent restriction—Property first let in 1947—Payment to landlord of excessive price for furniture—Right of purchaser to repayment—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 8—Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32), s. 9, sub-s. 1.

The Rent and Mortgage Interest Restrictions Act, 1923, provides by s. 9, sub-s. 1: "Where the purchase of any furniture or other "articles is required as a condition of the grant, renewal, or "continuance of a tenancy or sub-tenancy of a dwelling-house "to which the principal Act applies . . . . if the price exceeds "the reasonable price of the articles, the excess shall be treated "as if it were a fine" and the provisions of s. 8 of the Act of 1920 are to apply.

The landlords let for the first time in 1947 for a term of five years a dwelling-house which had been brought within the Rent Restriction Acts by the Act of 1939. On the occasion of the granting of that lease, the landlords demanded and were paid in respect of certain furniture which the tenant was obliged to acquire a price in excess by the sum of 585*l*. of its reasonable price. The tenant relying on s. 9, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, brought these proceedings to recover that sum. The landlords contended that s. 9 did not apply to the case of a dwelling-house which "was "not let as a separate dwelling" when the demand for an excessive price for furniture was made. The county court judge gave judgment for the tenant.

Held, dismissing the appeal, that there was no ground for construing the phrase "dwelling-house to which the principal "Act applies" in s. 9 as meaning "a dwelling-house let as a "separate dwelling" or for limiting the application of the section to houses which had already been let. Where two constructions of a statute, were possible, the court would prefer that which avoided a penal consequence. The condition for the application of that principle was absent here, as the meaning of s. 9 was clear. Accordingly, there was no ground for construing s. 9 so as to avoid the penalty imposed by s. 8 of the Act of 1920 where a premium was taken.

Remmington v. *Larchin* [1921] 3 K. B. 404, considered.

APPEAL from West London county court.

By a lease dated September 29, 1947, the defendants T. W. Moore and S. G. Thorne let to the plaintiff, E. M. Minns, flat No. 6 in No. 27 Queens Gate, South Kensington, for a term of five years at a rent of 225*l*. per annum. On the occasion of the grant of that lease the landlords required the tenant to purchase certain furniture. The price paid by the tenant exceeded, it was found, by the sum of 585*l*. its reasonable price. The flat had never been let before and had been first brought within the provisions of the Rent Restriction Acts by the Act of 1939.

The tenant in these proceedings claimed by virtue of the combined operation of s. 8, sub-s. 1 of the Rent and Mortgage

Interest Restrictions Act, 1920 (1) and of s. 9, sub-s. 1 of the Rent and Mortgage Interest Restrictions Act, 1923 (2) repayment of the sum she had paid in excess of the reasonable price of the furniture. The county court judge gave judgment for the tenant holding inter alia, that even if s. 9 of the Act of 1923 did not apply until the premises were let, the landlords' demand for an excessive price continued after the letting had taken place as payment was not made until after execution of the lease.

The landlords appealed.

Harold Marnham for the landlords. At the time when the lease of these premises was granted, as they had never been let before, this house was not within the Rent Restriction Acts until it was let. Accordingly, s. 9 of the Act of 1923 does not apply to this letting. It is first submitted that in s. 9, sub-s. 1 of the Act of 1923 the phrase "to which the principal "Act applies" qualifies the words "dwelling-house" and not "tenancy." In order to make the section operate in accordance with the intention of the Acts, "dwelling-house" in the section must be construed as meaning "a dwelling-"house" let as a separate "dwelling." Until a dwelling-house has been let it is not "a dwelling-house to which the

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(1) The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 8, sub-s. 1: "A "person shall not, as a condition "of the grant, renewal or continuance of a tenancy or sub-"tenancy of any dwelling-house "to which this Act applies, "require the payment of any "fine, premium, or other like "sum, or the giving of any "pecuniary consideration, in "addition to the rent, and, "where any such payment or "consideration has been made or "given in respect of any such "dwelling-house under an "agreement made after the "25th March, 1920, the amount "or value thereof shall be recover-"able by the person by whom "it was made or given."

(2) The Rent and Mortgage Interest Restrictions Act, 1923, s. 9, sub-s. 1: "Where the "purchase of any furniture or "other articles is required as a "condition of the grant, renewal, "or continuance of a tenancy "or sub-tenancy of a dwelling-"house to which the principal "Act applies, the price demanded "shall, at the request of the "person on whom the demand "is made, be stated in writing, "and if the price exceeds the "reasonable price of the articles, "the excess shall be treated as "if it were a fine or premium "required to be paid as a condition "of the grant, renewal, or con-"tinuance, and the provisions "of s. 8 of the principal Act, "including the penal provisions, "shall apply accordingly."

"principal Act applies," and s. 9, sub-s. 1 has no application. Secondly, s. 8 of the Act of 1920 and s. 9, sub-s. 1 of the Act of 1923 are penal sections and if there is an ambiguity, the landlord should be given the benefit of any doubt as to their true construction: per Bankes L.J. *Remmington* v. *Larchin* (1). As this was a first letting the landlords could have charged what rent they pleased. Therefore they should not be penalized for having taken a capital payment instead of a higher rent. There were here two transactions, the sale of the furniture and the letting. The agreement to sell the furniture was made before there was in fact a letting of the premises.

R. Willis for the respondent. It is submitted that the Rent Restriction Acts apply to premises of a rateable value to be within their provisions whether such premises have been let or not: see per Scott and Goddard L.JJ. *Davies* v. *Warwick* (2); per Scott L.J. *Field* v. *Gover* (3); *Lederer* v. *Parker* (4). The phrase "dwelling-house to which the principal Act "applies" is used over forty-three times in these Acts and it has different meanings in different sections. Its meaning depends on the context. In s. 9, sub-s. 1, it means a dwelling-house of a rateable value to be within the Acts.

Evershed M.R.: This appeal has raised a question of some novelty, and (like many questions under the Rent Restriction legislation) not free from difficulty, as to the application to the facts of this case of s. 9, sub-s. 1, of the Rent Act of 1923, and s. 8 of the earlier Act of 1920, which is, so to speak, brought into play by s. 9, if the latter section does apply.

The facts of the present case are not in dispute. The house is one within the Metropolitan area of London, and it is one of which the rateable value does not exceed the maximum stated in s. 3, sub-s. 1 of the Act of 1939, namely, 100*l.* a year. I gather that the value did exceed the limit or ceiling specified in the earlier Acts, so that the house was not subject to the application of the Acts prior to that of 1939. The house was let by the present appellants, the defendants in the action, to the respondent plaintiff in September, 1947, for a term of five years. It is conceded that on the occasion—and I use for the moment a somewhat colourless word—of the grant of this lease, the landlords demanded in respect of certain furniture which the tenant was obliged to acquire a price in excess by the sum of 585*l.* of its reasonable value. Finally, it appears that this occasion was the first time on which these premises were let. That is important for this reason: as I have already mentioned, the house was brought within the ambit of the Rent Restriction legislation by the Act of 1939, the standard rent would fall to be determined (according to the amended provisions of s. 12 of the Act of 1920) by reference first to the rent at which the house was let on September 1, 1939, if it was so let; failing that, at the rent at which it was last let before that date; and, failing any letting before that date, at the rent at which it was first let after that date. Since we are told that the rent, which was 225*l.* per annum, specified in this transaction of September, 1947, does in fact form the standard rent of the premises, I assume that that was the first occasion of this house's letting.

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(1) [1921] 3 K. B. 404.
(2) [1943] K. B. 329, 331, 334.
(3) [1944] K. B. 200, 205.
(4) Ante p. 90.

The tenant, having paid for the furniture the sum of 585*l.* in excess of the reasonable price, in due course brought the present proceedings to recover that excess in reliance on the application to her case of s. 9, sub-s. 1, and before the learned county court judge she succeeded in her application.

On a first reading of the sub-section, as a matter of ordinary English, I confess that it appeared to me reasonably clear that the present transaction is one covered by its language. Here was a dwelling-house to which the principal Acts apply, in the sense that it was a dwelling-house apparently brought within the Acts by the terms of s. 3, sub-s. 1 of the Act of 1939, by reason of its rateable value being below the maximum there stated; and here was a sum required—that is, demanded—as a condition of the grant of this tenancy, and that sum demanded was in respect of the kind of articles there specified and was in excess of the reasonable price of those articles. At a first reading of the section the answer appeared to be a reasonably simple one. But Mr. Marnham has raised an argument of some complexity and ingenuity to the contrary effect, and it depends for its validity, first and last, on this consideration, that the term "dwelling-house to which "the principal Act applies" in s. 9, sub-s. 1, of the Act of 1923, on its true interpretation and having regard to other provisions in other parts of the Acts, must mean "a dwelling-house let "as a separate dwelling." He goes on to say that, since when the requirement or demand was made the dwelling-house was not let as a separate dwelling, because at that point of time it was not yet let at all, therefore the section does not apply to this case.

C. A.
1949
MINNS
v.
MOORE.
Evershed M.R.

To that argument there are, as it seems to me, somewhat serious logical objections. If this section means what it says, it must be reasonably obvious that at the date when the impugned requirement is made, in a very great many cases, the house will not be in the condition of being let. This section is dealing with the case where, as a condition of the grant of the lease, a demand for a premium in the shape of excessive price for furniture is made. I, of course, agree that in some cases—perhaps many cases—the negotiations and the transaction of the grant of the new lease will take place during an existing tenancy. But the language equally obviously contemplates that at the time the negotiations and transaction occur there will be no letting; and it will be the letting in question which gives to the house the character of being let.

Mr. Marnham gets over that difficulty, as I follow him, in this way. He says that in the case where the house has been let so that the Rent Acts have, according to his own interpretation, applied to it, then the terms of what has been described as the "enigmatic" sub-s. 6 of s. 12 of the Act of 1920 preserve the characteristic for the house that the Rent Acts still apply to it during periods when it is in fact untenanted That sub-section is well-known. "Where this Act has become. "applicable to any dwelling-house, it shall continue to apply "thereto whether or not the dwelling-house continues to be "one to which the Act applies." I am happy to think that it is unnecessary to attempt any further consideration of the meaning of that sub-section, and I will assume in Mr. Marnham's favour, that it would provide an answer to the problem in the case of a house that once had been within the Acts by reason (inter alia) of having been let. But that is not a complete filling up, I think, of the gap in this argument. The argument is supported and, at first sight, fairly and reasonably supported, by this consideration: Mr. Marnham says that the real object of this section, plainly, is to prevent a landlord, who is prohibited from charging a rent in excess of the standard rent, from achieving that result by a subterfuge or device such as the charge of a premium or a sale of furniture or other sticks and articles at a wholly inflated price. Where, therefore, says the argument, as in this case, there is no pre-existing standard rent, there is no logical reason for the application of this section. If Messrs. Moore and Thorne, the landlords, had chosen, instead of charging 225*l*. per anum as rent and 585*l*. plus for the furniture, to charge 500*l*. a year rent and nothing for the furniture (assuming always the willingness of the tenant to pay) they could have done so without any infraction of the Act. But there is still this difficulty. A house which first comes within the scope of the Acts as a result of the Act of 1939, may nevertheless have its standard rent fixed by reference to a letting long before and at a time when the house was admittedly not controlled by the Acts. For example, if this house, first brought within the Acts in 1939, had been let, say, 20 years ago at 200*l.* a year, that 200*l.* a year would have been the standard rent, so that, if Mr. Marnham is right in his construction of s. 9, the landlords would have been able by a subterfuge such as the one employed in the present case to get a consideration for the grant of the new controlled letting which was in excess of the standard rent.

I am far from saying that these considerations are fatal to the argument, but they do, to my mind, at least remove what might otherwise appear to be a good logical basis for the argument. I must, therefore, proceed to see whether its premise is well founded, namely, that you must read into the words "dwelling-house to which the principal Act applies," the added words " let as a separate dwelling." I must point out that even if those words must be read in, I must not be taken as saying that necessarily the argument would prevail, because I still, for myself, adhere to the view that this section does not contemplate a division of the transaction mentioned into a strict chronological sequence of particular events, but is dealing with it all as one transaction. But I think that even if such a division into points of time were permissible, Mr. Marnham would not succeed, because I am not satisfied that for the purposes of this section the court is compelled to insert after the word " dwelling-house " the words, " let " as a separate dwelling."

I do not wish to take up time by an elaborate analysis of the provisions of these Acts, which have been, in all conscience, often enough considered by the courts ; but I point out that under the original Act of 1920, s. 12, which states the type of dwelling-house to which the Act applies, uses in sub-s. 2 the well-known formula : " This Act shall apply to a house . . . . " let as a separate dwelling, where either," etc. I do not myself read that sub-section as being, in ordinary language, a definition clause. It is stating to what type of house the provisions of the Act would apply, and, when one considers the purposes of the Act and its main provisions, it is, I think, clear that though it has been said to give a dwelling-house something in the nature of a status, it is concerned to regulate the relationship between someone who can be described as a landlord and someone who can be described as a tenant. But that particular formula, which, as I say, does not appear to me to be strictly speaking a definition, has been changed somewhat in the later enactment; for the corresponding paragraph in the Act of 1939, s. 3, sub-s. 1, is that "subject "to the provisions of this section" the principal Acts shall "apply to every other dwelling-house of which the rateable "value . . . . did not exceed," etc. There is no reference, be it observed, in that sub-section to the phrase "let as a "separate dwelling"; but by s. 7 of the same Act—the Act of 1939—among other provisions of the earlier legislation, s. 16 of the Act of 1933 is incorporated, and s. 16 contains among other provisions—and it is an interpretation section—this: "Unless the context otherwise requires, 'dwelling-"'house' has the same meaning as in the principal Act, "that is to say, a house let as a separate dwelling," etc. Mr. Marnham says that that compels the court to treat "dwelling-"house" as a term of which there is a definition, and so to read into s. 9 and any other place where you find the word "dwelling-house" the words "let as a separate dwelling." I cannot think that the change in the formula used in the Act of 1939 can have been intended to have had a vital change in the general conception of the application of the Acts, but, however that may be, like other interpretation clauses, it is introduced with the reservation "unless the context other-"wise requires."

Mr. Willis, for the tenant, drew our attention to instances in the legislation in which the words "dwelling-house to which "this Act applies" cannot sensibly mean a dwelling-house that is at the particular point of time in question let as a separate dwelling. Of the examples given, one was s. 9, sub-s. 1 of the Act of 1920. That is the section which deals with excessive rents in the case of furnished lettings, and it opens with the phrase: "Where any person lets, or has, "before the passing of this Act, let any dwelling-house to "which this Act applies . . . . at a rent which includes "payment in respect of furniture," etc. Bearing in mind particularly that furnished lettings are in general excluded, and the terms of the sub-section itself, I think the words "dwelling-house to which this Act applies" in the sub-section can only sensibly mean a dwelling-house within what I may call the economic limits provided by the legislation. I do not think that the point made by Mr. Willis is got over by the fact that in *Lederer* v. *Parker* (1), the point was made that the provisions of s. 12, which exclude from the ambit of the Act furnished lettings, are introduced by "save as "expressly otherwise provided," and by the consideration that s. 9 is an express provision to the contrary. The point still remains here that you have this phrase "dwelling-house "to which this Act applies," and you find it in a context which, to my mind, makes it reasonably plain that it can only mean a dwelling-house within the stated economic limits. Another example was cited by Mr. Willis, and I refer to it because it seems to me to be a good one, and that occurs in s. 3, sub-s. 3 of the Act of 1933. It follows sub-s. 2, which deals with the case of a certificate of a housing authority having been obtained certifying that the authority will provide alternative accommodation. Then sub-s. 3 says: "Where no such certificate "as aforesaid is produced to the court, accommodation shall "be deemed to be suitable if it consists of either (*a*) a dwelling-"house to which the principal Acts apply . . . ." If there is one thing that must be as plain as that the night follows the day, it is that the accommodation deemed suitable must be a house which is open for occupation—to suggest that accommodation shall be deemed to be suitable if it consists of a dwelling-house already let to somebody else who cannot be got out is, on the face of it, an absurdity.

Somervell L.J. again in his reference during the argument to s. 12, sub-s. 1 of the Act of 1920 (dealing with standard rent) indicated that if you are to treat "dwelling-house" always as meaning "dwelling-house let," etc., it gives a very peculiar and artificial meaning to provisions for fixing the standard rent by reference to lettings after particular dates. If a house is brought within the Act, and the rent is to be fixed at the sum at which it was let after the date at which it was introduced, so to speak, the Act must contemplate the dwelling-house being within the general ambit of the Acts during the period when it is not so let.

I think other illustrations might, if time and ingenuity sufficed, be found of similar instances. But the result of what I have said is this, that when one looks at s. 9, sub-s. 1, of the Act of 1923, which is the section here applicable,

(1) Ante p. 90.

C. A.
1949
MINNS
v.
MOORE.
Evershed M.R.

I can see no compelling reason for reading into this phrase "dwelling-house to which the principal Act applies" an alleged definition which would have the effect, I think, of destroying its ordinary rational meaning and also creating, as I have already stated, certain logical inconsistencies, which one cannot easily attribute to it.

Mr. Marnham's last point—and it is an important one—was this. He said that if there are two views to be taken of this section, then the court must prefer that one which avoids a penal consequence. In the case of *Remmington* v. *Larchin* (1) a case in this court, it was laid down that s. 8, which, as I have already said, is brought into play if s. 9 applies, is a penal section, and the principles which found a place in the judgments of Bankes L.J. and Scrutton L.J. to be applied in the construction of penal statutes are well-known. If there were here a fairly balanced alternative, I think that the duty of the court would unquestionably be to lean to that meaning which avoided a penalty. But, to my mind, the condition for the application of those principles is absent. Here the choice is between what I think is a natural and prima facie meaning of the section and a somewhat unnatural and artificial meaning only arrived at by applying an alleged definition provision, which is shown to be in many other cases inapplicable. For those reasons I do not think that there is a case for saying that the penalty ought to be avoided and that we must so construe s. 9, sub-s. 1, of the Act of 1923 as to avoid it.

For the reasons which I have given I think that the conclusion reached by the county court judge was correct, and I would, therefore, dismiss the appeal.

SOMERVELL L.J.: I agree, and I do not wish to add anything to the observations which the Master of the Rolls has made with regard to the various other parts of these Acts which were relied on by the appellant in favour of his argument. All I wish to state is quite shortly my reasons for thinking that s. 9 of the Act of 1923 bears a plain meaning and that there is nothing else in the Acts which substitutes any other meaning or throws any doubt upon it. I will start with s. 8 of the Act of 1920, of which this is an extension: "A person shall not, "as a condition of the grant of a tenancy of any dwelling-house "to which this Act applies, require the payment of any fine, "premium or other like sum." I do not think that one can split up the transaction and regard the requirement of the fine as something which precedes the letting. If there was an attempt to do that, I do not think it would get round the section. The section contemplates the whole thing being treated as one. Then, as it seems to me, what you have to consider with regard to a dwelling-house is not its status before the transaction is completed but its status under the transaction. If that is right, then no one disputes that under the transaction of the grant of the tenancy and the exaction of the premium the house is let as a separate dwelling to which the Act applies and the rent, if it is a first letting, will be the standard rent. That seems to me to be the plain meaning of this section, and for the reasons which have been given by the Master of the Rolls, the various provisions in other Acts, which have been referred to, do not seem to me to displace that meaning, or, indeed, throw any doubt upon it. I have used the words of s. 8 of the Act of 1920, but the same argument applies to the words which are to be found in s. 9 of the Act of 1923: "where the purchase of any furniture is "required as a condition of the grant of a tenancy of a dwelling-"house to which the principal Act applies." There again the time when you have to consider whether it is a dwelling-house, as it seems to me, is as a result of and as the subject-matter of the letting.

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(1) [1921] 3 K. B. 404.

For these reasons I think this appeal fails.

HODSON J.: I agree. I would only add that, although the county court judge, in my view, arrived at a correct decision for the reasons already stated in the judgments delivered, he does appear to have accepted a submission which was made in this case, and by accepting that submission to have held that the landlord was wrong, even if the landlord's contention was accepted that his house only came within the Acts, or only became a house to which the Acts applied, at the time of the first letting. He arrived at that conclusion by holding that the requirement of the excessive price continued after the first letting had taken place. In my judgment, the transaction must necessarily be treated as a whole, and the difficulty, if there was one, could not be got over by ascertaining the date in each particular case from the time at which the requirement began or ended. Therefore, in my judgment, that part of the learned county court judge's judgment was erroneous.

C. A.

1949

MINNS
v.
MOORE.

Hodson J.

I have nothing to add to what has been said by my Lords on the meaning of the section. In my judgment, it is quite plain, and to adopt any other meaning would be straining the language, to which this court is not compelled by consideration of other sections in the Acts or any authorities interpreting this or any other section.

I agree that this appeal fails.

Appeal dismissed.

Solicitors: *Dod, Longstaffe and Fenwick; Freeborough & Co.*

B. A. B.

C. A.

1949

July 19, 25, 26.

Bucknill, Cohen and Asquith L.JJ.

SORRELL *v.* PAGET.

Distress damage feasant—Pound covert—Tender—Plaintiff's heifer impounded by defendant—Right to impound—Demand by defendant for "salvage" and "keep" of heifer—Demand alleged to be exorbitant both in quantity and quality—Duty still on plaintiff to estimate the damage and tender, in money, the equivalent.

In a case of distress damage feasant, the statement of Tindal C.J. in *Gulliver* v. *Cosens* (1845) 1 C. B. 788, was that, however extortionate the demand of the distrainor for compensation for damage caused by the animal distrained upon in point of amount, this did not excuse the distrainee from the duty which lay on him, as a tortfeasor, of forming his own estimate of the damage and making a tender in money of that amount. If he omitted to do this, the continued detention of the animal by the distrainor was lawful, provided that it was originally so. This statement was approved in *Glynn* v. *Thomas* (1856) 11 Exch. 870. The rule is to the contrary in the case of a lien claimed by a repairer of goods, where the owner is excused from tendering (*a*) if he has no knowledge or means of knowledge of the right amount; or (*b*) if the person claiming the lien for a wrong cause or amount makes it clear that he will not release the goods repaired, unless his full claim is satisfied: see the judgment of Scrutton L.J. in *Albemarle Supply Co.* v. *Hind & Co.* [1928] 1 K. B. 307, 318.

In distress damage feasant, the position is the same as that stated by Tindal C.J. in *Gulliver* v. *Cosens* (supra), when the distrainor's demand is not for an extortionate amount of compensation for damage done, but for payment in respect of something wholly distinct from compensation for damage, e.g., a reward for his services in rescuing the animal from a position of danger. The distrainee must (1.) estimate the damage, and (2.) tender the estimated amount in money, whatever the distrainor's demand, whether it be improper in relation to the quantity or the quality of that demand.

Per Asquith L.J. This rule set out in *Gulliver* v. *Cosens* (supra) was harsh and, it might be, unreasonable, but it seemed to have been part of our law for centuries.

A. and B. occupied farms which abutted on a railway line. A.'s heifer strayed on to the line in the evening, when darkness was approaching. B., observing the heifer, telephoned to the railway station and an express train was stopped. B. then drove the heifer off the line and into a stubble field of his own. During the night, or the following morning, the heifer escaped from this field on to a road, which was a highway, and from the highway strayed on to another field of B.'s, where was B.'s T. T. herd. B. then impounded the heifer in his barn, in pound covert Subsequently, on A.'s servants claiming the heifer, B., claimed " salvage 2*l*." and " 1*s*. 0*d*. a day keep," but no evidence was given that B. claimed for any damage which might have been done by the heifer. Neither A. nor his servants tendered any money to B. On a claim by A. against B. for the conversion of the heifer, there was no express record of any damage done by the heifer on B.'s land, but, in the Court of Appeal, Cohen L.J. said that it must be inferred from the judgment of the trial judge that he was satisfied that there was sufficient damage done by the heifer to make the tender necessary.

Held, that B. committed no wrong by taking and impounding the heifer.

Held also, that on A. claiming the heifer, since he made no tender for any damage the heifer might have done, B. was entitled to continue her detention.

APPEAL from Maidstone county court.

The plaintiff and the defendant occupied farms, each of which abutted on the main railway line from London to Dover. In October, 1948, the plaintiff bought a heifer at market and brought it to his farm. On October 22, in the early morning, the heifer strayed on to the railway line. The defendant drove the heifer off the line at a level crossing, where it was taken into the possession of the plaintiffs' servants, the defendant making a complaint. In the evening of the same day the heifer again strayed on to the railway line. The defendant telephoned to the nearby railway station and a train—the Golden Arrow—was stopped. Darkness was approaching and the defendant drove the heifer off the line and into a stubble field of his own. When last seen that night the heifer was sleeping peacefully in that field.

During that night or in the early morning of October 23, the heifer escaped from this field on to a road which ran

C. A.
1949
SORRELL
v.
PAGET.

between the stubble field and another field of the defendant, and was a highway. From the highway the heifer strayed into this other field of the defendant where were the cattle of the defendant's T. T. herd. The defendant, who was anxious to keep this herd free from all possible infection, drove the heifer to a barn of his and there impounded it. He fed it with baled hay and gave it water. The defendant did not communicate with the plaintiff or tell him that the heifer was in this barn.

On October 27, the plaintiff, having ascertained that the heifer was in the defendant's barn and having tried to communicate with the defendant on the telephone but without success, sent two men with a lorry to collect the heifer. There was a slight divergence in the evidence as to what happened at the interview between the plaintiff's two men and the defendant, but the judge preferred the evidence of the defendant. The defendant's account, as noted by the county court judge, was: "B., one of the men, said he had come "for the beast. I said: 'I want 2*l*. for salvage, 1*s*. 0*d*. per "'day keep. Never calculated.' B. said that he had no "money and referred me to the lorry driver. I repeated to "the lorry driver what I had said to B. He said: 'You will "'have to send in a bill.' I expostulated about the matter "and said that I could not trust their master. I said I wanted "to be paid before I let her go. He said he would pay for "the keep. I said that I wanted to be paid the whole amount. "He did not produce any money. No money offered . . . . "10*s*. 0*d*. and 3*s*. 0*d*. was not mentioned [referring to what "the plaintiff's men had said]. He said that he would pay "for the keep. I sent him back to get the money, 2*l*. and "'keep'—whatever 'keep' amounted to—not then calculated. "Lorry driver said he would pay keep. I said I wanted the "whole amount." There was no express claim by the defendant for any damage the heifer might have done.

After a week's stay in the barn, the heifer died.

By his claim the plaintiff alleged that on October 23 the defendant seized and took possession of his heifer and that on or about October 26 the plaintiff by his servants verbally demanded the heifer from the defendant, but the defendant refused to deliver it up to the plaintiff and thereby converted it to his own use and deprived the plaintiff of it; further, that the defendant so negligently treated the heifer that it went mad and, on or about October 30, died. The plaintiff claimed 35*l.*, the value of the heifer. By his defence the defendant pleaded that the heifer on October 23 was wrongfully in the defendant's close doing damage there to the defendant and that the defendant thereupon seized and took the heifer as a distress for the damage and impounded it in a barn. On October 27 the plaintiff by his servants demanded the return of the heifer, but neither at the time of making the demand, nor at any time prior to the heifer's death, did the plaintiff tender any compensation to the defendant for the damage caused by the heifer, nor make nor offer to make to the defendant payment for the reasonable cost of the food and water supplied by the defendant to the heifer. The defendant denied negligence.

His Honour Judge Clements found that the defendant did not wrongfully take possession of the heifer and did not wrongfully refuse to deliver the heifer up to the plaintiff's men since they did not tender any money for "keep" or "damage"; that there was never any kind of offer to pay any money at all and, therefore, no legal tender; and, lastly, that the plaintiff had failed to prove any negligence on the part of the defendant or that the heifer died as a result of the defendant's fault. The barn was large and well-ventilated and a suitable place in which to impound the animal. Accordingly, he gave judgment for the defendant.

The plaintiff appealed.

H. G. Garland for the plaintiff. No right of distress damage feasant arose here. For such right to arise two facts must be proved: that the animal trespassed on the distrainor's land and that, when trespassing, the animal did damage to the distrainor's land or animals. Here neither fact was proved: the defendant brought the heifer wrongfully on to his own stubble field and all that followed resulted from this wrongful act of the defendant. Secondly, there was no evidence of any damage done by the heifer.

On the assumption that the defendant was rightfully in possession of the heifer, which is denied, when the plaintiff demanded the surrender of the heifer by his men on October 27, the defendant had no right to retain the heifer on a claim for "salvage" or for "the keep" of the heifer in food and water. Those were the only claims which the defendant made: he put forward no claim for damage done by the heifer. The claim for salvage is unknown in law for rescue on land. See the judgment of Bowen L.J. in *Falcke* v. *Scottish Imperial Insurance Co.* (1). Nor was there any right to retain the heifer until the receipt of payment for her keep by the owner. At common law the distrainor had to provide "keep" for the animal seized. "Or [if] it is a pownd covert or close, as "to impownd the cattle in some part of his house and then "the cattle are to be sustained with meat and drink at the "perill of him that distraineth and he shall not have any "satisfaction therefore." Co. Litt. 47 b. This liability was put on the statute book by s. 4 of the Cruelty to Animals Act, 1835, with power to recover "the good and "sufficient food and nourishment" of the impounded animal from the owner to an amount not exceeding its double value, before a justice, with an alternative remedy (after seven clear days from the impounding) to sell the animal and to apply the price for the keep of the animal and the expenses of the sale, returning the balance to the owner. The Act of 1835 was repealed by the Cruelty to Animals Act, 1849, which merely restated the liability of the impounder to feed and water the animal with a power to any other person to feed and water an animal impounded for more than twelve successive hours, the cost of which could be recovered before a justice from the owner. The Cruelty to Animals Act, 1854, restored the right to recover double the value of the food or water from the owner, with the alternative remedy of selling the animal for its "keep" at any public market. By the Protection of Animals Act, 1911, the Cruelty to Animals Acts, 1849 and 1854, were repealed. By s. 7, sub-s. 1, the liability on the distrainor to feed and water the animal was reimposed. By sub-s. 2 any person was entitled to enter the pound to feed and water an animal impounded for six successive hours, and by sub-s. 3: "The reasonable cost "of the food and water supplied to any animal impounded "or confined in any pound shall be recoverable summarily "from the owner of the animal as a civil debt."

Throughout this legislation no power has been given to the impounder to continue the distraint of the animal to secure the food and water given to it whilst impounded. The defendant therefore had no right to seize the animal on October 22 or 23 or to refuse to surrender it on October 27, 1948. [He was stopped.]

P. T. S. Boydell (*R. G. Dow* was with him) for the defendant.

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(1) (1886) 34 Ch. D. 234, 248.

The heifer during the night of October 22–23, 1948, escaped from the stubble field, where it was last seen sleeping peacefully, on to the highway, which ran between the stubble field and other fields of the defendant. From the highway the heifer broke into another of the defendant's fields, where was the defendant's T. T. herd, which he was most anxious to keep free from any infection. That was undoubtedly a trespass and when the defendant saw her there, he was entitled to impound her on his own land in pound covert. It was the plaintiff's duty to keep his fences in repair and to keep his cattle on his own land. The entry of the heifer into this field was not due to the default of the defendant: see the judgment of Bramwell B. in *Singleton* v. *Williamson* (1).

[*Garland:* The cause of the original escape of the heifer from the plaintiff's land was a breach of duty on the part of the railway executive to fence their line.]

Winfield writes in his Textbook of the Law of Tort (3rd ed.), under the heading "Distress Damage Feasant," at p. 323: "It is a moot point whether the distrainor must "prove damage and the question has been fully considered "by Dr. Williams" (Liability for Animals, pp. 70–76). "Our "own suggestion is that, where it is for trespass, there ought "to be no need to prove damage: first, because trespass is "actionable per se; secondly, because it is desirable in the "application of self-help (of which distress is a species) that "the law should be sharply defined; it might be difficult "for the distrainor to be certain in some cases whether the "trespass did or did not involve damage. Moreover, doubtful "as the authorities are, we believe that the trend of them "in modern times favour our suggestion." [He was stopped.]

H. G. Garland continues: Any damage there might be with the eventual loss of the heifer was due to the original wrong committed by the defendant when he seized this heifer and took it on to his farm. He had no right to take it there. The effect of any negligence there may have been on the part of the plaintiff was terminated, when by the independent action of the defendant the heifer was driven from the railway line on to his own land. The defendant became a voluntary bailee of the heifer and responsible to the plaintiff for her safety.

The county court judge has found that there was no actual tender in money by the plaintiff, but the defendant had no

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(1) (1861) 7 H. & N. 410.

C. A.
1949
Sorrell
v.
Paget.

right to a tender of money for salvage, for damage (since none was proved or claimed) or for the "keep" of the heifer: the plaintiff was entitled to the heifer since the defendant held it merely as a voluntary bailee.

In any case, the plaintiff was relieved of any obligation to tender by the excessive demand of the defendant—excessive in amount and excessive in quality—in that he demanded payment for rescuing the heifer from the railway line and for its "keep" thereafter. The plaintiff had no knowledge or means of knowledge of the right amount of damage (if any). He could not, therefore, tender it: see the observations of Scrutton L.J. in *Albemarle Supply Co. Ld.* v. *Hind & Co.* (1). "A person claiming a lien must either claim it for a definite "amount or give the owner particulars from which he himself "can calculate the amount for which a lien is due." The defendant here did neither with regard to the damage done, if any, for which only he could claim. That was a case of the lien of a repairer, but there is every reason to think that the two rights are on a par: see the judgment of Lord Campbell C.J. in *British Empire Shipping Co. Ld.* v. *Somes* (2). The defendant was bound to deliver up the heifer to the plaintiff's men, when they claimed her on his behalf, on October 27, 1948.

P. T. S. Boydell for the defendant. There must of necessity have been some damage done by the heifer and the county court judge must have considered there was some such damage because of his insistence on the necessity of tender. The reasoning of Tindal C.J. in *Gulliver* v. *Cosens* (3) affirmed in *Glynn* v. *Thomas* (4) shows that even if the demand of the distrainor is extortionate, the distrainee must assess the damage and actually tender it. Here, it was found by the county court judge that there was no tender by the plaintiff. If the case turns on the question of who was the original wrongdoer, it is plain that the plaintiff was, from his not keeping his heifer on his own land. As the editor of Salmond on the Law of Torts (10th ed.) says at p. 291: "Merely to "be in possession of a chattel without title is not a conversion, "nor indeed is it a tort of any kind . . . . So he who finds "a chattel lost cannot be sued for a conversion, however long "he keeps it, unless by refusing to give it up or in some other

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(1) [1928] 1 K. B. 307, 308, 318.

(2) (1858) E. B. & E. 353, 364.

(3) (1845) 1 C. B. 788.

(4) (1856) 11 Exch. 870.

" way he shows an intention to detain it adversely to the " owner. No one is bound, save by contract, to take a chattel " to the owner of it, his only obligation is not to prevent the " owner from getting it when he comes for it." But when the plaintiff came to demand this heifer, by his man, on October 27, the heifer had trespassed in the defendant's field (where was the T. T. herd) from the highway, and the defendant was entitled to impound the heifer and not to deliver her up before the plaintiff had tendered for the damage done. The law may be harsh; but the onus of assessing the damage, and tendering it, was on the plaintiff. The defendant, once he was entitled to impound the heifer, need do nothing to acquaint the plaintiff of the position—either that he is in possession of the animal or what moneys he requires for its release. The defendant does not appear to have been asked what he meant by the word " salvage " and the county court judge appears to have treated the demand as one for compensation for the wrong done—the trespass. I agree that no question of tender arises unless the heifer trespassed from the highway into this field, where was the T. T. herd of the defendant. Once that is established, as it was, it is irrelevant what the defendant suggested that he wanted by way of compensation. The duty lay on the plaintiff to assess the adequate amount and to tender it in actual money.

H. G. Garland replied.

BUCKNILL L.J. The first question that arises is: Did the defendant commit any wrong to the plaintiff when he took possession of the plaintiff's heifer? In my opinion he did not. It was getting dark at the time and the defendant, rightly, in my opinion, in the interests of the plaintiff and his heifer and of the common safety of the public using the railway, drove the heifer again for the second time that day off the railway and, on this occasion, into one of his own fields, which the county court judge has described as a place of " comparative safety." Unfortunately, that night the heifer escaped from that field on to a highway and thence strayed into another field of the defendant where was his T.T. herd. The defendant saw the heifer there in the morning to his dismay, because he was anxious to keep his herd free from all possible infection. The defendant then impounded the heifer in his barn. I think that the second question in the case is: Was he entitled to do so? In my opinion he was. He fed

C. A.
1949

SORRELL
v.
PAGET.

Bucknill L.J.

the heifer with baled hay and gave it water. Since, apparently, the plaintiff and the defendant were not on good terms, the defendant did not communicate with the plaintiff and tell him that the heifer was in his barn.

The third question is whether, when the plaintiff ascertained that his heifer was in the defendant's barn and sent his men to fetch her, the defendant was wrong in refusing to hand over the heifer. The county court judge has dealt with that point in his judgment where he said: "No actual money was "offered to the defendant for the keep or damage. He "told the men to go and get the whole of the money, keep "and compensation. It was open to the men to do one of "two things: hand the defendant three shillings"—I think he must mean 1*s.* 0*d.* a day—"for keep, or go away and "return, and tender the keep money. It had been argued "that they should be excused because they were told to go "and get the money. There was never in this case any kind "of offer to pay any sum at all, and therefore no legal tender." I think that the learned judge's view there was right.

During the course of the case a discussion took place as to the use of the word "salvage." There is no doubt that, strictly speaking, salvage on land is not a recognized head of claim in the common law as it is by maritime law, at sea. I need only refer to the judgment of Bowen L.J. in *Falcke* v. *Scottish Imperial Insurance Co.* (1), to show what is the position. He said: "The general principle "is, beyond all question, that work and labour done or money "expended by one man to preserve or benefit the property "of another do not according to English law create any lien "upon the property saved or benefited, nor, even if standing "alone, create any obligation to repay the expenditure. "Liabilities are not to be forced upon people behind their "backs any more than you can confer a benefit upon a man "against his will." Then he goes on to deal with maritime salvage. Unfortunately, in this case, although it is admitted that the defendant did ask for salvage, there is nothing in the judge's notes to show that he was asked what he meant by salvage. There is no evidence to show that he made any claim for damage apart from salvage, and I think he clearly would be entitled to damage if he could prove it; damage, for instance, done by the heifer in getting into this field and grazing, and possible damage to the herd.

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(1) 34 Ch. D. 234, 248.

But, assuming that the defendant was putting forward a claim, which included a claim for salvage proper, and that such a claim was not recognizable by law, I think that the cases do establish that it was the duty of the plaintiff to make a tender in respect of any damage done by the animal. He never did make a tender, and until the tender was made the defendant was justified in keeping the heifer in the barn.

The only other point is whether the defendant was negligent in keeping the heifer in that barn for a week before it died. If she was lawfully there, it was for the plaintiff to prove that the defendant was negligent, and that the death of the animal was the result of that negligence. That is a question of fact. It was a question which, I suspect, was argued with great vigour before the judge, and he has come to the conclusion, as he says in his judgment, that "the plaintiff "has not got anywhere near proving that the animal died "as a result of the defendant's fault. I am satisfied that "the barn was a large, well-ventilated one and a suitable "place to impound the animal." He was satisfied that she had been properly attended to all the time she was alive. So the plaintiff failed on this issue. For these reasons, in my judgment, this appeal should be dismissed.

COHEN L.J. I am of the same opinion. On the question whether the right of distress damage feasant had accrued to the defendant, I have nothing to add to what has been said by my Lord. That being so, the question is whether the refusal to deliver up the heifer on October 27 gave the plaintiff a cause of action. The plaintiff was entitled to delivery of the heifer on making tender of the proper amount of compensation for damage. The judge has found that no tender was made. Mr. Garland first submitted that no damage was proved. It is true that there is no express record of any evidence as to damage, or any reference to damage in the judgment, but I think it is a clear inference from the judge's judgment that he was satisfied that there was sufficient damage to make a tender necessary. On any other basis it was unnecessary for him to go into the question of tender. But as an alternative to this first submission, Mr. Garland in an interesting argument submitted that his client was relieved of the obligation to tender by the excessive demands on the part of the defendant, demands which he said were not only excessive in amount, but excessive in quality, that is

C. A.
1949

SORRELL
v.
PAGET.

Cohen L.J.

to say, in that he demanded "salvage" and "keep" when he was only entitled to damage. In support of that argument he relied on the observations of Scrutton L.J. in *Albemarle Supply Co. Ld.* v. *Hind & Co.* (1). The observations in question are sufficiently recorded in the headnote. The Lord Justice said: "A person claiming a lien must either claim it for a "definite amount or give the owner particulars from which "he himself can calculate the amount for which a lien is "due. The owner must then, in the absence of express "agreement, tender an amount covering the lien really existing. "If he does not, unless excused, he has no answer to a claim "of lien. He may be excused from tendering (*a*) if he has "no knowledge, or means of knowledge, of the right amount; "or (*b*) if the person claiming the lien for a wrong cause or "amount makes it clear that he will not release the goods "unless his full claim is satisfied, and that claim is wrongful. "The fact that the claim is made for more than the right "amount does not matter unless the claimant gives no particulars from which the right amount can be calculated, "or makes it clear that he insists on the full amount of the "right claimed." That was a case not of a right of distress damage feasant, but of the lien of a repairer who had done repairs to a car; a lien arising out of a contract and not a right arising out of the tort of the party against whom the lien was sought to be asserted. But Mr. Garland said that there was reason to think that the two rights were on a par, and he referred us to the case of the *British Empire Shipping Co. Ld.* v. *Somes* (2), where the question that arose was as to the right of a ship repairer to claim 21*l.* a day for the use of the dock during detention. Lord Campbell C.J., in giving the judgment of the court, said: "Although the lord of "a manor be entitled to amends for the keep of a horse which "he has seized as an estray (*Henly* v. *Walsh* (3)), the distrainor "of goods which have been replevied cannot claim any lien "upon them: *Bradyll* v. *Ball* (4). So, where a horse was "distrained to compel an appearance in a hundred court, "it was held that, after appearance, the plaintiff could not "justify detaining the horse for his keep (5). If cattle are "distrained damage feasant, and impounded in a pound "overt, the owner of the cattle must feed them; if in a

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(1) [1928] 1 K. B. 307, 308.
(2) E. B. & E. 353, 366.
(3) (1706) 2 Salk. 686.
(4) (1785) 1 Bro. C. C. 427.
(5) Buller N. P. 45.

" pound covert or close, ' the cattle are to be sustained with " ' meat and drink at the peril of him that distraineth, and " ' he shall not have any satisfaction therefor '." (1) That case would only, I think, go to this, that there would be no obligation to tender for keep. Indeed, Mr. Garland has called our attention to the fact that the right to claim for keep did not arise until s. 4 of the Cruelty to Animals Act, 1835, was passed. This Act was repealed by the Cruelty to Animals Act, 1849, but the right was restored by s. 1 of the Cruelty to Animals Act, 1854. The right given by the two Acts of 1835 and 1854 was only a statutory right giving rise to a summary remedy and not a right to detain the animal for the amount due. The Acts of 1849 and 1854 were repealed by the Protection of Animals Act, 1911, which by s. 7, sub-s. 3, gave the right to the distrainor to recover the " keep " of the animal from the owner summarily, as a civil debt. But, despite the similarity, it seems to be clearly established by authority that there is a radical difference in one respect, and that is in respect of the question of the onus of fixing the amount which must be tendered in order to give the distrainee the right to return of the property on which the distraint has been levied. That distinction seems to be clearly established by the decision in *Gulliver* v. *Cosens* (2). The actual decision in that case was as to the right of a distrainee, who had satisfied the excessive demand in order to recover his goods, to recover the amount thus paid in excess, as money had and received to his use. But in giving the judgment of the court, Tindal C.J. expressed an opinion on the wider point which is relevant here. He said (3): " It appears to me " that, when the present plaintiff found he was too late to " make a tender, so as to entitle himself to replevy the sheep " and to succeed in an action of replevin, his proper course " was, to make a tender of sufficient amends to cover the " damage sustained; and, in the event of the defendant " refusing to accept the sum tendered, and deliver up the sheep, " he should have brought detinue ; "—note (*a*) in 1 C. B. 796, " i.e., upon a tender *before* the impounding "—" for, they were " held by the defendant merely as a pledge. In that case " the hazard of the sufficiency of the tender would fall, as it " ought to do, on the owner of the cattle. It has been urged " that here a tender was unnecessary, inasmuch as the sum

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(1) Co. Litt. 47b.

(2) 1 C. B. 788.

(3) Ibid. 796.

"demanded for compensation was exorbitant: that argument, "however, as it seems to me, is answered by saying that the "risk of determining the real amount of damage, is not by "law imposed upon the defendant. This I should be disposed "to hold upon principle, and independently of the authority "of *Lindon* v. *Hooper* (1), which I am unable to get over, "and which I am not aware has been overruled; and, though "cases have occurred in which it has been decided that an "excessive demand dispenses with a tender, yet those were "cases where the law made it incumbent *on the defendant* "correctly to ascertain the amount of his demand." That case was approved and applied by the Court of Exchequer Chamber in *Glynn* v. *Thomas* (2), where Coleridge J., in giving the judgment of the court, said (3): "In *Gulliver* v. *Cosens* (4) "the court assumed the sum demanded for the damage to have "been excessive, but laid it down that the plaintiff, being the "original wrong-doer, was still bound to tender the sum "which he alleged to be sufficient; and in the present case "the plaintiff, for the same reason, was equally bound to "make the tender."

Those two cases seem to me to lay down a rule which we are bound to follow, and I do not think that it makes any difference in principle that the demand in the present case was excessive, or may have been excessive, not only in quantity but in quality. Had the plaintiff paid the amount demanded and sought to recover it as money had and received, the fact that there was an excessive demand in quality might have afforded a ground, notwithstanding the decision in *Gulliver* v. *Cosens* (4), on which he would have been entitled to recover the amount paid as money had and received. It does not seem to me that an excessive demand, even in quality, relieves the plaintiff of the duty, which the learned judge has found he did not perform, of making a proper tender.

I desire only to say in conclusion that it has been suggested that *Gulliver* v. *Cosens* (4) might not be followed, in so far as it held that the action for money had and received would not lie. That suggestion is to be found in Glanville Williams on Liability for Animals (1939), at p. 116, but there is nothing to suggest that in so far as the case laid down that the onus of making a proper tender was on the plaintiff, it was not still the law. Indeed, it seems to be the plain view of the learned

(1) (1776) 1 Cowp. 414.
(2) 11 Exch. 870.
(3) Ibid. 878.
(4) 1 C. B. 788.

author, expressed on p. 114, that the law in this respect is as laid down in *Gulliver* v. *Cosens* (1). For these reasons, I agree that the appeal should be dismissed.

ASQUITH L.J. I also agree and will only add a sentence or two on the question whether tender was excused.

The case of *Gulliver* v. *Cosens* (1), decides directly no more than that where the rightful distrainor demands as a condition of releasing the animal more money than he is entitled to as compensation for the damage done, and the owner of the animal pays this exorbitant sum, the latter cannot recover back the excess as money had and received, at any rate, where the pound in which the animal is impounded is a common pound. But it affirms very clearly the principle that, however extortionate the demand of the distrainor for compensation, in point of quantum, this does not excuse the owner from the duty which lies on him, as a tortfeasor, of forming an estimate of the amount of damage and making a tender of that amount. If he omits to do this the continued detention of the animal by the distrainor is lawful, provided it was originally so. Is the position the same when the distrainor's demand is not for an extortionate quantum of compensation for damage done, but for payment in respect of something wholly distinct from compensation for damage, for instance, a reward for his services in rescuing the animal from a position of danger? If it is, then the defendant should succeed, if not, he fails. Here the defendant claimed what he called "salvage"; something, strictly speaking, not in law recoverable for services rendered on land at all: salvage by land is a legal chimera. Does this alter the position and excuse tender? No direct authority on the point has been brought to our notice, and perhaps none exists. For myself, I think the principle underlying *Gulliver* v. *Cosens* (1) (which was affirmed by the Exchequer Chamber in *Glynn* v. *Thomas* (2), both as to what it actually decided and as to the reasoning upon which it proceeded) is that the owner of the animal must estimate the damage and tender the estimated amount, whatever the nature of the distrainor's money demand, whether in relation to the quantity or the quality of that demand. It is just as unreasonable to require the owner to make such a tender where the actual damage amounts to 1*s*. 0*d*. and the distrainor demands in respect of such damage

(1) 1 C. B. 788.

(2) 11 Exch. 870.

100*l*., as to require him to make a tender where the damage is 100*l*. and he demands 100*l*., but claims it under the inappropriate title of "salvage." Yet if the distinction insisted upon by counsel for the plaintiff were upheld and the owner made no tender, in the first case the distrainor would be within his rights in continuing the detention, and, in the second, he would not: he would have forfeited his right. Mr. Garland was unable to cite any authority which decided, directly or indirectly, that the owner of the animal distrained is ever excused from making a tender by any kind of demand made by the distrainor.

The rule laid down in *Gulliver* v. *Cosens* (1) is harsh, and, it may be, unreasonable. But it certainly impresses the type of lien involved in distress damage feasant with a totally different character from that in an ordinary contractual lien such as was in issue in *Albermarle Supply Co. Ld.* v. *Hind & Co.* (2), the authority relied on by the plaintiff. But it seems to me to have been part of our law for centuries and to affirm that no demand made by the distrainor can excuse the owner of the animal from tendering a sum estimated by himself as equivalent to the damage the animal has done. This was not done in the present case. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiff: *J. Albert Davis & Co.*

Solicitors for the defendant: *Radcliffes & Co., for E. A. Morling and Sons, Maidstone.*

(1) 1 C. B. 788. (2) [1928] 1 K. B. 307.

C. G. M.

Reversed. C.A. [1950] 1 All E.R. 720. Reversed. [1950] 2 K. B. 237

CUNLIFFE *v.* GOODMAN.

1949 *Nov.* 16.

Lord Goddard C.J.

Landlord and tenant—Agreement for tenancy—Dwelling-house used as business premises—Covenant to repair and re-instate—Termination of tenancy—Intention of landlord to pull premises down—Claim for damages for breaches of covenant—Claim barred—Reinstatement included in repair—Landlord and Tenant Act, 1927 (17 & 18 *Geo.* 5, *c.* 36), *s.* 18, *sub-s.* 1.

The tenant of a dwelling-house, which he was permitted to use for business purposes, covenanted to keep the premises in good and sufficient repair during the term and in particular to reinstate them at the end of the term as a private dwelling-house. At the expiration of the tenancy the premises were in bad repair, and the landlord had the intention of pulling them down and rebuilding them. He brought an action against the tenant for damages for his breach of covenant to repair and to reinstate the premises as a private dwelling-house.

Held, so far as the covenant to repair was concerned, that, as the landlord at the time of the expiration of the lease had the intention of pulling the premises down, it followed from the decision of the Court of Appeal in *Salisbury* (*Marquess*) v. *Gilmore* [1942] 2 K. B. 38, that the tenant was protected from liability to pay damages by s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927.

Held, also, that "repair" in s. 18, sub-s. 1, included reinstatement, and, consequently, that the tenant was also under no liability in respect of his failure to reinstate the premises as a private dwelling-house.

ACTION.

By an agreement dated June 10, 1943, the plaintiff, Lady Gabriella Cunliffe, let to the defendant, H. Goodman, certain premises, No. 1 Abdale Road, Shepherds Bush, which at that time consisted of a studio with dwelling rooms attached. The tenancy was to be for the duration of the war between England and Germany and was expressed to be terminable by three months' notice on either side. By the terms of the agreement the defendant was permitted to use the premises for the trade or business of a manufacturing chemist, and certain necessary alterations were carried out on them. The lease contained a covenant by the tenant that he would "keep the said premises in good and "sufficient repair during the said term and in particular "will reinstate the premises at the end of the term hereby "granted as a private dwelling-house and replace all the "fixtures removed during the tenancy except the bath and "wash basin which were handed over to the landlord at the "commencement of the tenancy."

On September 7, 1945, a notice to quit was given to the defendant. He went out of possession and yielded up the premises to the plaintiff on November 30, 1945. At the termination of the lease the premises were in bad repair and the plaintiff accordingly brought an action against the defendant claiming damages for the breach of his covenant to repair and to reinstate them as a private dwelling-house. The defendant raised the defence under s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927 (1), that the facts established that the landlord had the intention of pulling down the premises on the termination of the lease and that, consequently, no damages could be recovered for breach of the covenant to repair and reinstate, whatever the condition of the premises might be when the lease came to an end. On the facts and correspondence Lord Goddard C.J. held that at the time of the expiration of the tenancy the plaintiff was intending to pull down the premises and erect others on the site.

L. F. Sturge for the plaintiff [after submitting that the evidence and correspondence did not establish that at the date of the expiration of the tenancy the plaintiff had the intention of pulling down the premises]. In order to bring the case within the terms of s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, there must exist at the material time an absolute intention on the part of the landlord to pull down the premises: *Salisbury* (*Marquess*) v. *Gilmore* (2). It is not sufficient that the plaintiff in the present case entertained the hope that she might be able to pull the house down and rebuild on its site if she could obtain the necessary licences from the authorities concerned.

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(1) Landlord and Tenant Act, 1927, s. 18, sub-s. 1: "Damages "for a breach of a covenant or "agreement to keep or put "premises in repair during the "currency of a lease, or to "leave or put premises in repair "at the termination of a lease ". . . . shall in no case exceed "the amount (if any) by which "the value of the reversion "(whether immediate or not) in "the premises is diminished owing "to the breach of such covenant "or agreement as aforesaid; and "in particular no damage (sic) "shall be recovered for a breach "of any such covenant or agreement to leave or put premises "in repair at the termination "of a lease, if it is shown that "the premises, in whatever state "of repair they might be, would "at or shortly after the termination of the tenancy have "been or be pulled down, or such "structural alterations made "therein as would render valueless "the repairs covered by the "covenant or agreement."

(2) [1942] 2 K. B. 38.

[LORD GODDARD C.J. A person may intend to do a thing but may not be able to do it. Intention does not depend on whether you can or may carry out what you intend to do: it is a state of mind.]

Even supposing that the defendant is protected by s. 18, sub-s. 1, from liability under his covenant to repair because the landlord had an intention, when the tenancy expired, to pull the premises down, that protection does not apply to the case of his covenant to reinstate. In the case of such a covenant other considerations and different principles of law apply. In *Eyre* v. *Rea* (1), Atkinson J. held that where a tenant covenanted not to allow the premises to be used otherwise than as a private dwelling-house and subsequently converted them into flats, the case was not governed by s. 18 of the Act of 1927 and the landlord was entitled, as damages, to the cost of restoring them to their original state. Similarly in the present case it is submitted that the plaintiff is entitled to damages for breach of the covenant to reinstate for the reason that "repair" in s. 18, sub-s. 1, does not cover reinstatement.

Berryman K.C. and *C. D. Myles* for the defendant.

[LORD GODDARD C.J. The court need not trouble you except on the last point argued.]

The decision in *Eyre* v. *Rea* (1) has no bearing on the present case. In that case there was no question of an intention to pull down the premises and the tenant was merely being sued for breach of his covenant not to permit the premises to be used otherwise than as a private dwelling-house. Atkinson J. held that he was entitled to damages of which the measure was the cost of restoring the premises to their original condition. Reinstatement is included in "repair" in s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, since reinstatement means putting into repair. In *Anstruther-Gough-Calthorpe* v. *McOscar* (2), Atkin L.J. said that repair "connotes the idea of making good damage so as to "leave the subject so far as possible as though it had not "been damaged." If repair includes reinstatement, it is clear that the defendant is entitled to the protection afforded to a tenant by s. 18, sub-s. 1, of the Act in the case of a landlord who intends to pull the premises down on the termination of the tenancy.

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(1) [1947] K. B. 567.

(2) [1924] 1 K. B. 716, 734.

LORD GODDARD C.J. [stated the facts and referred to the defence raised under s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927. After reviewing the correspondence, he held that at the time of the termination of the tenancy on November 30, 1945, the plaintiff intended to pull down the premises. He was therefore of opinion that so far as the covenant to repair, as distinct from the covenant to reinstate the premises as a private dwelling-house, was concerned, the case was directly covered by the decision of the Court of Appeal in *Salisbury* (*Marquess*) v. *Gilmore* (1), to which decision he was a party and by which he was bound. His Lordship continued :] It was argued by Mr. Sturge on behalf of the plaintiff that it was necessary to distinguish an intention to do something from a hope that one might be able to do it which, he submitted, was all that the plaintiff had in the present case. It might be that a philosopher might be able to find a distinction between the two things, but to my mind if a person wants to do something, shows that he is trying to do it and is constantly giving directions for the furtherance of his object, then he " intends " to do it. I have not the least doubt in the present case that certainly up to October 11, 1945, the plaintiff was intending to pull down this old building and erect another in its place. She never abandoned that intention until possibly at some time in the following May, although I have now been told that she has sold the premises. The plaintiff did not give evidence that she had no intention of pulling down the premises, and in the face of the correspondence I think that it would have been impossible for her to do so.

One other point was raised by Mr. Sturge which is of some interest. He says : " True it may be that the plaintiff is " debarred by the statute from recovering damages for breach " of the tenant's covenant to repair, but she is not debarred " from recovering damages for breach of the covenant to " reinstate." It should be noticed that the lease does not describe the premises as a dwelling-house. It provides that " the tenant may use the said premises for the trade or business " of a manufacturing chemist only and not use the said

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(1) [1942] 2 K. B. 38.

"premises for any other trade or business whatsoever without "the consent in writing of the landlord." Clearly, therefore, the tenant was allowed to carry on a trade or business on the premises. Then comes the covenant by the tenant that he will "keep the said premises in good and sufficient repair "during the said term and, in particular, will reinstate the "premises at the end of the term hereby granted as a private "dwelling-house and replace all the fixtures removed during "the tenancy except the bath and wash basin which were "handed over to the landlord at the commencement of the "tenancy." Section 18 of the Landlord and Tenant Act, 1927, concerns breaches of covenant to keep or put premises in repair during the currency of a lease or on its termination, and Mr. Sturge argues that anything that can be said to be a work of reinstatement for the purpose of restoring the premises to the condition of a private dwelling-house is not caught by the words of this section, because this is a separate covenant to reinstate the premises at the end of the term. In support of that contention he relied on the judgment of Atkinson J. in *Eyre* v. *Rea* (1). In my view that case does not assist Mr. Sturge in his argument. There the tenant, who had covenanted that he would use the premises as a private dwelling-house only, proceeded entirely to alter their character and convert them into a set of flats. In those circumstances it was held that the Landlord and Tenant Act, 1927, did not prevent the landlord from recovering damages for that breach of covenant. On the actual words of the covenant in the present case, I should say that the parties to it both regarded the reinstatement to which the covenant referred as being a matter of repair, and that they meant it to be so. In construing such an Act as the Landlord and Tenant Act, 1927, it is right to bear in mind the words of Lindley M.R. in *Thomson* v. *Lord Clanmorris* (2) where he pointed out that, in construing an Act of Parliament, "regard must be had not only to the words used, but to "the history of the Act, and the reasons which led to its "being passed. You must look at the mischief which had "to be cured as well as at the cure provided." If I look to see why the Landlord and Tenant Act, 1927, was passed, and the mischief it was designed to cure, I think that it would be giving an unduly narrow construction to the language of s. 18 if I were to hold that because part of the work in the

(1) [1947] K. B. 567.

(2) [1900] 1 Ch. 718, 721, 725.

1949

CUNLIFFE
v.
GOODMAN.

Lord Goddard
C.J.

present case consisted in taking away from the premises certain things which were consistent with their being used as a factory, but were inconsistent with their use as a private dwelling-house, the work to be carried out did not fall within the words of the section. I think, therefore, that I ought to construe the reinstatement of the premises as a private dwelling-house as being included in the word "repair" in s. 18. For these reasons, in my opinion, there must be judgment for the defendant.

Judgment for the defendant.

Solicitors for the plaintiff: *Atkins, Walter and Locke.*
Solicitors for the defendant: *Amphlett & Co.*

P. B. D.

C. A.

BACON *v.* GRIMSBY CORPORATION.

1949
Nov. 3.

Bucknill,
Somervell and
Denning L.JJ.

Housing—House occupied "by persons of the working classes"—In some respect unfit for human habitation—Notice from local authority requiring specified works—Earlier consideration by authority—Detailed estimate of cost of individual items of repair not a condition precedent—Regard to estimated cost of works and "the value which "it is estimated the house will have when the works are completed"—"Value" means freehold value—Housing Act, 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8 *c.* 51), *s.* 9, *sub-ss.* 1, 3.

By s. 9, sub-s. 1, of the Housing Act, 1936, where a local authority on consideration of an official representation or a report from any of their officers or other information are satisfied that any house occupied by persons of the working classes is in any respect unfit for human habitation, they shall "unless they are "satisfied that it is not capable at a reasonable expense of being "rendered so fit" serve on the person having the control of the house a notice requiring him to execute works specified in the notice, stating that those works will render the house fit for human habitation.

By sub-s. 3: "In determining for the purposes of this Part "of this Act whether a house can be rendered fit for human "habitation at a reasonable expense, regard shall be had to the "estimated cost of the works necessary to render it so fit and the "value which it is estimated that the house will have when the "works are completed."

A sanitary inspector made a general report to a local authority on certain houses occupied by members of the working classes, stating that in the case of each house certain works, which he had specified, could be done at a reasonable cost to render it fit for human habitation ; but he did not give a detailed estimate in the case of each house showing the expense of the items of the work required. The local authority served notices under sub-s. 1 of s. 9 on the person having control of the houses, requiring him to execute the specified works.

Held, that, notwithstanding the terms of sub-s. 3 of s. 9, the fact that there were no detailed estimates of the cost of the works to be executed before the authority did not render the notice invalid. There could not be implied from the terms of s. 9 a condition precedent to the service of a notice that such a detailed estimate should be before the authority.

Observations of Lord Hanworth M.R. in *Cohen* v. *West Ham Corporation* [1933] Ch. 814, followed.

Held, also, that " the value which it is estimated that the house " will have when the works are completed," within the meaning of sub-s. 3 of s. 9, was the freehold value, and not the value to a leaseholder, whose lease, it might be, would expire in a few years.

Appeals from Grimsby county court.

Judge Shove had disallowed nine appeals by William Bacon (as agent of two ground leaseholders of houses, named Ricketts), against notices served on behalf of Grimsby Corporation under s. 9 of the Housing Act, 1936 (1), in respect of works which those notices required to be done at the several

(1) Housing Act, 1936, s. 9, sub-s. 1 : (Power of local authority to require repair of insanitary house.) " Where a local authority, " upon consideration of an " official representation, or a " report from any of their " officers, or other information " in their possession, are " satisfied that any house which " is occupied, or is of a type " suitable for occupation, by " persons of the working classes " is in any respect unfit for " human habitation, they shall, " unless they are satisfied that " it is not capable at a reasonable " expense of being rendered so " fit, serve upon the person having " control of the house a notice " requiring him, within such " reasonable time, not being less " than twenty-one days, as may be " specified in the notice, to " execute the works specified in " the notice and stating that, in " the opinion of the authority, " those works will render the " house fit for human habitation."

Sub-section 3 : " In determining " for the purposes of this Part " of this Act whether a house " can be rendered fit for human " habitation at a reasonable " expense, regard shall be had " to the estimated cost of the " works necessary to render it " so fit and the value which it is " estimated that the house will " have when the works are " completed."

In s. 11—(Power of local authority to order demolition of insanitary house) the opening words of sub-s. 1 are the same as those in sub-s. 1 of s. 9

C. A.

1949

BACON
v.
GRIMSBY
CORPORATION.

houses. Seven of the houses were in Charlton Street, and two in Ayscough Street, Grimsby, all of them were occupied by members of the working classes, and William Bacon was the person in control of all the houses.

In the case of the houses in Ayscough Street there were ground leases of 75 years, with 12 years to run; in that of the houses in Charlton Street there were ground leases of 99 years with 21 years to run. All the houses were let on weekly tenancies at about 10*s.* a week. Before the county court judge one Parkinson, a sanitary inspector, stated that he had made a report on each of the houses to the sanitary sub-committee, who in turn reported to the health committee and then to the full council. He did not give detailed estimates to the committee in the case of each house showing the cost of the individual items of repairs required. All that he did was to make a general report that these repairs could be done at a reasonable cost. The county court judge decided that the notices were valid under sub-s. 1 of s. 9.

William Bacon appealed in every case.

Percy Lamb K.C. and *D. P. Sells* for the appellant. The application for a notice under s. 9, sub-s. 1 of the Housing Act, 1936, for the repair of an insanitary house is made ex parte, or the local authority may act on other information in their

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to the words "working classes," and continue: "is unfit for "human habitation and is not "capable at a reasonable "expense of being rendered so "fit. They shall serve . . . . "notice . . . ."

Section 15, sub-s. 1: "Any "person aggrieved by—(*a*) a "notice under this Part of this "Act requiring the execution of "works; . . . . may, within "twenty-one days after the "date of the service of the "notice . . . . appeal to the "county court within the "jurisdiction of which the "premises to which the notice ". . . . relates are situate, "and no proceedings shall be "taken by the local authority "to enforce any notice . . . . in "relation to which an appeal is "brought, before the appeal has "been finally determined . . . ."

Section 188, sub-s. 4: "In "determining for the purposes "of this Act whether a house "is fit for human habitation, "regard shall be had to the "extent, if any, to which by "reason of disrepair or sanitary "defects the house falls short of "the provisions of any byelaws "in operation in the district "or of any enactment in any "local Act in operation in the "district dealing with the "construction and drainage of "new buildings and the laying out "and construction of new streets "or of the general standard of "housing accommodation for "working classes in the district."

possession. The person in control of the house is not heard on the issue until a notice has been served on him, when he may appeal against the notice to the county court. It is on this appeal that he is first heard. In this case the sanitary inspector made a report on each of these houses to the sanitary sub-committee, and the local authority acted on that report in serving the notices. The inspector gave no detailed estimate in the case of each house showing the cost of the item or items of the repairs required. All that he did was to make a general report that these repairs, which were specified, could be done at a reasonable cost. But by sub-s. 3 of s. 9 the authority are to have regard to the estimated cost of the works necessary to render the house fit for human habitation. Moreover, they have to decide whether the house can be rendered fit for human habitation at a reasonable expense. How can the authority ascertain that cost and that expense unless they have an estimate of the cost thereof before them? Of estimates of cost there were none before the authority. The cost of the works to render the house fit for human habitation has to be compared with "the value which it is estimated that the "house will have when the works are completed." The authority, therefore, did not have before them the factors on which they could be satisfied that the house was capable at a reasonable expense of being rendered fit for human habitation. The only case which is of interest here is that of *Cohen* v. *West Ham Corporation* (1), where notices were served on the person in control of houses under s. 17 of the Housing Act, 1930, the predecessor of s. 9 of the Housing Act, 1936. In that case the person in control did not appeal to the county court and it was held that, since he had not appealed, in the absence of any evidence one way or another the Court of Appeal could not assume that the local authority had not properly discharged their duties, and that the notices served must be regarded as valid. The judgments contain valuable obiter dicta on the duty of the authority. Lawrence L.J., said (2): "Speaking for myself and assuming that under sub-s. 4" (now sub-s. 3 of s. 9 of the Act of 1936) "a duty was cast "upon the council to estimate the cost of the works necessary "to render the dwelling-house fit for human habitation and "the value which that dwelling-house would have after the "works were completed, I decline, in the absence of evidence "to the contrary, to hold that the council did not discharge

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(1) [1933] Ch. 814.

(2) Ibid. 834.

"its duty in that respect . . . . It is obvious that before "deciding to serve the notices they must take these matters "into consideration, as it would be their duty, if they were "satisfied that the work could not be carried out at a reasonable "expense to make a demolition order under s. 19" (now s. 11 of the Act of 1936). "Be that as it may, however, even if the "council has in some way neglected its duty in the present "case, I am clearly of opinion that the notices were given "under s. 17 and, therefore, if the owner desired to dispute "the notices on the ground that they were improperly given, "his proper course was to appeal against them under s. 22" (now s. 15 of the Act of 1936). This, then, was the ground of his decision. But in the case now before the court there was an appeal, and there is the admission that no detailed estimates of the works, alleged to be required, were ever given to the local authority. This point, though not raised by the pleadings, was taken before the county court judge.

Secondly, by sub-s. 3 of s. 9, when the local authority are determining whether a house can be rendered fit for human habitation at a reasonable expense, regard shall be had to the estimated cost of the works necessary to render it so fit and the value which it is estimated that the house will have when the works are completed. That value must refer to its value to the appellant, i.e. its leasehold value (see s. 10, sub-s. 3 of the Act of 1936). The county court judge held, in error, that the value referred to was the freehold value. The question at issue is the value of the house to the leaseholder. By s. 188, sub-s. 1 of the Housing Act, 1936, the term "owner" in the Act includes a person holding or entitled to the rents and profits of the building or land under a lease or agreement the unexpired term whereof exceeds three years. Lord Hanworth M.R., in *Cohen* v. *West Ham Corporation* (1) when referring to this question of "value" of the house in sub-s. 4 of s. 17 of the Act of 1930 (now sub-s. 3 of s. 9 of the Act of 1936) said (2): "To take into account what would probably "be the cost of the outlay required and to consider whether, "after that outlay had been incurred, it would be possible "to let the house and get a return for the total expenditure "upon the premises." To get "a return" must mean in this case for the leaseholder to get a return for the total expenditure on the premises. "Value" in this connexion must mean value to the person called upon to do the work: see *In re John, Jones* v. *John* (1) [*Angel* v. *Jay* (2) was mentioned].

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(1) [1933] Ch. 814.

(2) Ibid 833.

Thirdly, in the case of three of the houses the works required would cost 64*l*. The judge was wrong in supporting the decision of the authority that each of those houses was capable at a reasonable expense of being rendered fit for human habitation, having regard to the terms of s. 9, sub-s. 3, of the Act.

Melford Stevenson, K.C., and *L. G. Scarman* for the local authority were required to argue on the first point only raised by the appellant. By the terms of s. 9, sub-s. 1, the authority must be satisfied that the house is in some respect unfit for human habitation. In that case they are to serve a notice requiring specified works on the person in control of the house, *unless* they are satisfied that the house is not capable at a reasonable expense of being rendered so fit. The words of this provision are designed to mark the frontier line between the case of a notice requiring the execution of works under s. 9, and a notice under s. 11 calling for an offer to execute work required, with the alternative, if the offer is not accepted, that a demolition order will be made. The words of s. 11 provide that the authority have to be satisfied that the house "is unfit for "human habitation and is not capable at a reasonable expense "of being rendered so fit." The authority need have no regard to sub-s. 3 of s. 9 until they are in need of guidance as to whether they shall proceed under s. 9 or s. 11. The important words of sub-s. 3 are: "In determining for the purposes of this "Part of this Act"; the words are not, "for the purposes "of this section." If a doubt arises whether the case is not one for proceedings precedent to a demolition order, then the terms of sub-s. 3 give guidance. The lesser burden is placed on the authority under s. 9 by the words "*unless* "they are satisfied." The process of being satisfied is an administrative and not a judicial act.

In *Cohen* v. *West Ham Corporation* (3) the report of the medical officer of health was before the council, and cl. (*d*) stated: "Under s. 17 of the Housing Act, 1930, I report the "following houses as being in certain respects unfit for human "habitation and capable at a reasonable expense of being "rendered fit." Then was set out the list of the houses. Lord Hanworth M.R. said, speaking of sub-s. 4 of s. 17 of the

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(1) [1933] Ch. 370.
(2) [1911] 1 K.B. 666.
(3) [1933] Ch. 814.

C. A.

1949

BACON
v.
GRIMSBY
CORPORATION.

Act of 1930 (now sub-s. 3 of s. 9 of the Act of 1936) (1) : "That "word, 'regard,' is intended to be a loose and indefinite term, "and I think it enables the local authority to take into "account not merely an accurate estimate made by a surveyor "or an estate agent with a schedule of dilapidations, but to "take into account what would probably be the cost of the "outlay required, and to consider whether, after that outlay "had been incurred, it would be possible to let the house and "get a return for the total expenditure upon the premises."

BUCKNILL L.J. : I will ask Somervell L.J. to deliver the first judgment.

SOMERVELL L.J. : The county court judge decided that these were proper notices under s. 9 of the Housing Act, 1936. From that decision in these nine cases there is an appeal to this court, and the notice of appeal sets out with clearness the points which we have to consider. The first ground of appeal is that "the learned judge was in error when he held that no point was "taken by the appellant that the corporation had failed to "make proper inquiries before sanctioning the service of the "notice which was the subject matter of this appeal and that, "having regard to the fact that the corporation's expert "witness gave evidence that he had laid no estimate of the cost "of carrying out the repairs set out in the said notice before "the corporation, the said notice was bad in law and cannot "be enforced." That contention arises in this way. Evidence was called on behalf of the local authority. One Parkinson, a sanitary inspector, had reported in respect of these houses to the sanitary sub-committee. The latter reported to the health committee and then to the full council. The inspector gave evidence to this effect, which I read from the judge's note : "I made a report on each of these houses. I did not give "estimates to the committee. All that I did was to make "general report that those repairs could be done at a reasonable "cost."

Mr. Lamb contended that the failure to submit estimates (by which must be meant detailed estimates, showing the cost of the individual items of repairs necessary to these houses : this item will cost 30s., that 35s., and so on) to the committee of the local authority makes these notices bad. The argument runs rather on these lines : he says that under s. 9 the local authority have to address their minds to the question, as set out in sub-s. 3, whether the expense is reasonable, regard being had "to the estimated cost of the works necessary to render "it so fit and the value which it is estimated that the house "will have when the works are completed." Mr. Lamb said: "How can you have regard to the estimated cost of the works, "unless you have an estimate before you?" It will be noticed that sub-s. 3, does not refer back to sub-s. 1. The opening words of sub-s. 3 are: "In determining for the purposes of "this Part of this Act whether a house can be rendered "fit for human habitation." That is the criterion which has to be applied when that matter has to be determined. In considering whether the submission of a detailed estimate is a condition precedent to a notice given under s. 9, I am struck by the difference of the language in s. 9 and in s. 11, which concerns demolition orders. By s. 11 the local authority have to be satisfied that the house "is unfit "for human habitation and is not capable at a reasonable "expense of being rendered so fit." When we turn to s. 9, the wording is not "after being satisfied that it is "unfit for human habitation and is capable at a reasonable "expense of being rendered so fit"; and it seems to me that a lesser burden is placed on the local authority by the fact that the words are not those words, but are "unless they are "satisfied that it is not capable at a reasonable expense of "being rendered so fit."

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(1) [1933] Ch. 814, 833.

This first general point taken by Mr. Lamb, as it seems to me, did come before this court, though in somewhat different circumstances, in *Cohen* v. *West Ham Corporation* (1). In that case notices were served; no appeal was entered against them (as was done in this case); twenty-one days, the time for appeal, elapsed; and there was a provision in the Act that on the expiration of twenty-one days the notices were to become final and conclusive as to any matters which could have been raised on such an appeal. The applicant in that case obtained possession somehow—it may have been disclosed on discovery; I do not know; but, at any rate, it was before the court—of the minute showing what had happened before the local authority, and it is recited in these terms: "On April 1, 1932, "the council's medical officer of health made a report to their "housing committee, cl. (*d*) of which was: 'Under s. 17 of the "'Housing Act, 1930'" (that is the equivalent of and for all

(1) [1933] Ch. 814.

present purposes identical with s. 9 of the Act of 1936) "'I report the following houses as being in certain respects "'unfit for human habitation and capable at a reasonable "'cost of being rendered fit'," and then the numbers are given. "The committee reported that, having considered the representation contained in cl. (*d*), they recommended that notices "under s. 17 of the Housing Act, 1930, be served upon the "landlords, requiring them, within reasonable time, not being "less than twenty-one days, to execute such works as would "render the houses fit for human habitation. At a meeting "held on" such-and-such a date "the council resolved that "the committee's report be received and adopted, and its "recommendations carried into effect"; and on that the notices were served. The point was taken that the local authority had not directed their minds to the matters to which they had to direct their minds under s. 17. What I may call the main basis of the argument in that case was different from the argument in the present case. It was said there that they had merely, as it were, rubber-stamped the report of their officer and that there was no evidence that they had themselves directed their minds to the matter at issue. The point in that case was not, therefore, the same point as is being raised in this case; but observations were made which are, I think, of assistance here.

From the judgments of Lord Hanworth M.R., and of Lawrence L.J., it is clear that the minute which I have read was taken as recording what had happened; and it was taken as meaning that neither the committee nor the full council had before them what we have called in this case an estimate, but what was referred to by Lord Hanworth M.R. in that case as a schedule of dilapidations. After referring to the word "regard" in sub-s. 4 of s. 17 of the Housing Act, 1930, the forerunner of sub-s. 3 of s. 9 of the Housing Act, 1936, Lord Hanworth M.R. said (1): "That word 'regard' "is intended to be a loose and indefinite term, and I think "it enables the local authority to take into account not merely "an accurate estimate made by a surveyor or an estate agent "with a schedule of dilapidations, but to take into account "what would probably be the cost of the outlay required, "and to consider whether, after that outlay had been incurred, "it would be possible to let the house and get a return for the "total expenditure upon the premises. I am, therefore, of

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(1) [1933] Ch. 814, 833.

" opinion that what has been done here is abundantly sufficient " to justify the notices being served under s. 17, and not under " s. 19, which is to apply where it is not possible to repair " the house within the limits that I have specified." Lawrence L.J., referring to the phrase in s. 17, sub-s. 4, that " regard shall be had " to the estimated cost and the estimated value of the property, said (1) that it " does not imply that the " council is bound to have a certificate from a surveyor and " valuer before it can come to the requisite conclusion."

In order to succeed on his first point, Mr. Lamb has to satisfy us that as a matter of necessary implication one must imply in s. 9, sub-s. 1, a provision to the effect that the consideration of the detailed items of estimate is a condition precedent to the issue of a notice under that section. I find no words in the sub-section which would justify that proposition, and, indeed, I think that the form of words used makes it impossible to imply such a drastic provision, which, I think, in fairness to local authorities, it would be quite wrong to imply unless the context made it absolutely necessary. In coming to that conclusion, I think that I am following the decision on the point argued in *Cohen* v. *West Ham Corporation* (2), although, as I have said, the argument was somewhat different. That being so, we have not been troubled with any argument as to whether the point was sufficiently taken. I think that it is clear that it was taken in argument. Possibly, if we had taken a different view of the construction of the Act, questions might have arisen as to whether we had sufficient findings by the county court judge.

The second point taken in the notice of appeal is that " the learned judge was in error when he ascertained whether " the said house could be rendered fit for human habitation " at a reasonable expenditure by reference to its freehold " value and that he should have done so by reference to its " value to the appellant, that is to say, its leasehold value." The words of sub-s. 3 of s. 9 of the Housing Act, 1936, are: " Regard shall be had to the estimated cost of the works " necessary to render it so fit and the value which it is estimated " that the house will have when the works are completed." I should say that the words " value of the house " there point, prima facie, to an objective standard, though I agree that the word " value " is one which has to be construed according to its context, and in certain contexts may well be construed

(1) [1933] Ch. 834.

(2) [1933] Ch. 814.

C. A.

1949

BACON
v.
GRIMSBY
COR-
PORATION.

Somervell L.J.

as meaning a value to a particular person, although that is not expressly so stated; but I do not myself think that it is possible to construe it in that way in this case. Mr. Lamb submitted that in a case where the ground lessee had a lease of only two years to run, it might be of very little value to him, and that it might be a hardship if he were called upon to spend 30*l*., 40*l*. or 50*l*. on a cottage in which his interest was so slight. I can well see that. On the other hand, of course, unless the Act has provided that his interest is to be considered, he will have to suffer the hardship which Parliament has imposed in such cases as that; but it may well have been thought that in a case of that kind there would, anyhow in the vast majority of cases, be another factor which, if one is considering fairness, it would be relevant to consider, namely that under nearly all leases the lessee has at the end of the lease to deliver up the house in good condition. We are dealing with a house which, anyhow, is thought to be worth repairing at the time in question. It would be unlikely that the lessee would not have to do repairs such as are being contemplated in this class of case, namely, repairs necessary to make the house fit for human habitation under the terms of the lease. In all cases where those considerations apply, it is not, therefore, some new burden, which would never otherwise fall upon him, which is being put upon the lessee, but a burden which in the normal case, if he did not do the repairs now, would fall upon him, in that he would have either to undertake the repairs before the conclusion of his lease or to pay a sum in respect of his failure to do so. What chiefly influences my mind in rejecting this second ground set out in the notice of appeal is that, in my opinion, if, in this class of case, it had been intended that the local authority, in so far as they have to consider it, and the courts, when they have to consider the matter, should have regard to the value of the house to the particular lessee, in view of how much of his term is still to run, and possibly, I should think, the covenants in his lease, that would have been made plain on the face of the subsection, whereas it merely uses the words which I have quoted. I have come to the conclusion that the county court judge was right in taking, as he did, the value of the house spoken of in sub-s. 3 to be the freehold value, on the basis that these houses contained, as they did, tenants who had the right to claim the benefits of the Rent Restriction Acts. I therefore think that on that point the judge was right.

[The Lord Justice then discussed the third point taken by the appellant, on which this case is not reported, and continued :] For these reasons, I think that these appeals must be dismissed.

BUCKNILL L.J. : I agree.

DENNING L.J. : I agree. The appellant has contended that the corporation ought to have had before them, and considered, estimates of the cost of the works and estimates of the value of the houses. That depends on the construction of s. 9 of the Act. In my opinion once the local authority are satisfied that a house is in any respect unfit for human habitation, they must serve on the person having control of the house either a notice requiring him to repair it (a repairs notice) under s. 9 or a notice preliminary to a demolition order (a demolition notice) under s. 11 of the Housing Act, 1936. Of those two alternatives, they can only serve a demolition notice if they are also satisfied that the house is not worth the cost of the repairs. Unless they are so satisfied, they must serve a repairs notice. In determining which of the two notices they should serve, they must consider whether the repaired value of the house will justify the cost of the repairs, but they need not have precise estimates before them. Take, for instance, the houses in this case. In one of the houses all that was necessary was to remedy a broken w.c. pan and seat ; in another, to repair the wash-house boiler and flue ; in yet another, to put in a new kitchen range because the old one had become worn out. Those were plainly cases where a repairs notice should be served and not a demolition notice. It would be quite wrong to serve a demolition notice and pull down houses when work of such a comparatively small amount would make them fit. Cases might arise, of course, where it would be desirable to have figures showing the estimated cost of the work and the value of the house ; but it is the local authority who determine whether figures are necessary. The absence of figures does not mean that they did not do their duty. It seems to me that there is no evidence that they did not consider matters which they ought to have considered ; and on that point the appeal fails.

On the remaining points, it seems to me quite plain that the value of the house to be considered is the freehold value. The question is whether the house is worth the cost of the

C. A.
1949

BACON
v.
GRIMSBY
CORPORATION.

repairs; is it worth spending the money on it? The application of this test to the individual houses is a question of fact, on which we should not interfere. I agree that the appeals fail and should be dismissed.

Appeals dismissed.

Solicitors: *Godfrey Warr & Co., for John Barkers, Grimsby; Hyde, Mahon & Pascall for L. W. Heeler, Town Clerk, Grimsby.*

C. G. M.

MARRIAGE v. EAST NORFOLK RIVERS CATCHMENT BOARD.

C. A.
1949
Nov. 1, 2, 3, 4, 24.

Tucker, Singleton and Jenkins L.JJ.

Land drainage—Catchment board—Cleansing watercourse—Dredgings deposited on river bank—Diversion of flood water—Damage to bridge of adjoining landowner—Injury through exercise of board's statutory powers—Compensation—Action for damages for nuisance—Whether maintainable—Limitation—Public authority—Institution of action within one year of neglect or default—Continuing act, neglect or default—Land Drainage Act, 1930 (20 & 21 *Geo.* 5, *c.* 44), *s.* 34, *sub-ss.* 1, 3; *s.* 38, *sub-s.* 1*—Limitation Act,* 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 21.

The defendant catchment board, in pursuance of their powers under s. 34, sub-s. 1, of the Land Drainage Act, 1930, dredged a river in proximity to the plaintiff's mill and deposited the spoil on the south bank of the river, thereby raising the height of that bank by from one to two feet. The last dredgings were placed on the bank on January 6, 1944, and they there remained until December, 1946. In that month the river flooded, and, owing to the increased height of the south bank, the flood waters were unable to escape over it into flood channels, as they had formerly done, and were diverted into a by-pass on the north side, with the result that they caused the collapse of a bridge belonging to the plaintiff. On November 5, 1947, the plaintiff issued a writ against the board claiming damages for nuisance. The trial judge held that, although the board by their act had diverted the ordinary flood course of the river and had thus committed an act which if done by a riparian owner would have rendered him liable for damages, no action for nuisance was maintainable against the board and the plaintiff's only remedy was a claim for compensation under s. 34, sub-s. 3, of the Land Drainage Act. He further held that if the plaintiffs had a cause of action it was barred by s. 21 of the Limitation Act, 1939. On appeal the plaintiff was permitted to amend his statement of claim by pleading negligence on the terms that he was confined to the particulars already delivered.

Held, that the particulars delivered by the plaintiff did not disclose a case of negligence in the execution of the works by the board, such as would give the plaintiff a cause of action; that, accepting the facts as found by the trial judge, the plaintiff's only remedy was a claim for compensation under s. 34, sub-s. 3, of the Act of 1930; and that in the circumstances it was unnecessary to consider whether, if a cause of action existed, it would be barred by the Limitation Act.

Decision of Byrne J. [1949] 2 K. B. 456, affirmed.

Observations of Lords Hatherley and Blackburn in *Geddis* v. *Proprietors of the Bann Reservoir* (1878) 3 App. Cas. 430, 450, 456, and of Lord Dunedin in *Manchester Corporation* v. *Farnworth* [1930] A. C. 171, applied.

APPEAL from Byrne J. (1).

The plaintiff, B. F. Marriage, a miller and the owner of Limbourne Mill, situated on the River Waveney at Wortwell near Harleston, Norfolk, also owned a bridge across a by-pass channel on the north side of the river, which led to the mill. The River Waveney is included in the district of the East Norfolk Rivers Catchment Board, the defendants, and from October 1, 1943, the board, in the exercise of the powers conferred on them by ss. 34 and 38 of the Land Drainage Act, 1930 (2), were engaged in dredging the river. They deposited the spoil on the south bank of the river and, by so doing, raised the height of that bank by from one to two feet. The actual work of dredging was completed on January 6, 1944. In December, 1946, the Waveney was in flood and, by reason of the heightening of the south bank, the flood waters were unable to escape over it and get away by flood channels as they had done in previous years, and were compelled to run over the north bank and then through the by-pass channel, with the result that the buttresses supporting the plaintiff's bridge were undermined and the bridge collapsed. On November 5, 1947, the plaintiff issued a writ against the defendants, claiming damages for nuisance, and an injunction. On May 12, 1949, Byrne J. dismissed the action, holding that

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(1) [1949] 2 K. B. 456.

(2) Land Drainage Act, 1930, s. 34, sub-s. 1: "Every drainage "board acting within its district "shall have power—(*a*) to main- "tain existing works, that is to "say, to cleanse, repair or other- "wise maintain in a due state "of efficiency any existing "watercourse or drainage work: "(*b*) to improve any existing "works, that is to say, to deepen, "widen, straighten or otherwise "improve any existing water- "course, or remove mill dams, "weirs or other obstructions to "watercourses, or raise, widen "or otherwise improve any "existing drainage work: (*c*) to "construct new works, that is "to say, to make any new "watercourse or drainage work "or erect any machinery or do "any other act not hereinbefore

C. A.

1949

MARRIAGE
v.
EAST
NORFOLK
RIVERS
CATCHMENT
BOARD.

it was not maintainable against the catchment board, and that if it was maintainable it was barred by s. 21 of the Limitation Act, 1939 (1).

The plaintiff appealed.

Marshall K.C. and *Fortune* for plaintiff. The facts found by the judge are not challenged by the plaintiff, and, there being no cross-appeal, this court's decision must be based on the facts as so found. The questions for this court's decision are: (1.) did the plaintiff have any cause of action at all? If so, (2.) is his only remedy a claim for compensation under the procedure set out in s. 34, sub-s. 3, of the Land Drainage Act, 1930? If the two foregoing questions are answered favourably to the plaintiff, then (3.) is the present action barred by the Limitation Act? It is submitted that the facts as found by the judge give the plaintiff a right of action at common law.

Nuisance, as it is pleaded in the present case, is a continuing matter, but the essence of nuisance is not only an interference with the rights in land but also the causing of damage. There must be damage, either actual or potential, before nuisance is

"referred to, required for the "drainage of the area comprised "within their district."

Sub-section 3: "Where "injury is sustained by any "person by reason of the exercise "by a drainage board of any of "its powers under this section, "the board shall be liable to "make full compensation to the "injured person, and in case of "dispute the amount of the "compensation shall be determined in the manner in which "disputed compensation for "land is required to be determined "by the Lands Clauses Acts."

Section 38, sub-s. 1, empowers a drainage board, without making payment therefor, or giving compensation in respect thereof, to appropriate and dispose of any shingle, sand or other matter removed in the course of any work of widening, deepening or dredging and to deposit it on the banks of the watercourse.

(1) Limitation Act, 1939, s. 21, sub-s. 1: "No action shall be "brought against any person "for any act done in pursuance, "or execution, or intended "execution of any Act of "Parliament, or of any public "duty or authority, or in respect "of any neglect or default in "the execution of any such act, "duty or authority, unless it is "commenced before the expiration "of one year from the date "on which the cause of action "accrued: Provided that where "the act, neglect or default is a "continuing one, no cause of "action in respect thereof shall "be deemed to have accrued, "for the purposes of this sub-"section, until the act, neglect "or default has ceased."

C. A.

1949

MARRIAGE
v.
EAST
NORFOLK
RIVERS
CATCHMENT
BOARD.

established. Here the damage was caused in December, 1946, and the writ in the action was issued in November, 1947, within the twelve months fixed by the Limitation Act. A catchment board is under no duty to exercise their statutory powers, but if they do so they are liable for exercising them negligently or in an unreasonable way: see *East Suffolk Rivers Catchment Board* v. *Kent and Another* (1). This court, therefore, has to ask itself whether what was done by the defendants was a nuisance. If the nuisance arise from the proper exercise by the board of their powers, then, even though the nuisance be actionable, it falls to be dealt with under s. 34, sub-s. 3. If, however, the nuisance arise from an improper use by the board of their powers, then the injured party, it is submitted, is entitled to damages under the common-law remedy. There is clear authority for saying that where the board's powers under the Act could have been exercised without causing a nuisance they should have been so exercised, or the board are liable for causing unnecessary mischief: see *Hill* v. *Metropolitan Asylum District* (2)). The nuisance in the present case was not in depositing the spoil on the south bank, but in putting it there in such a way that the flood water could not escape by the flood channels. That was unnecessary, and the onus rests on the defendants to establish that there was no negligence on their part: see *Attorney-General* v. *Gaslight & Coke Co.* (3) and *Farnworth* v. *Manchester Corporation* (4). A common-law right exists for damage not authorized by the Land Clauses Act: *Imperial Gaslight & Coke Co.* v. *Broadbent* (5).

A clause which provides for the awarding of compensation applies only to the determination of the amount of compensation: *Boynton* v. *Ancholme Drainage and Navigation Commissioners* (6). The proper interpretation of s. 34, sub-s. 3, is that it only deals with the amount of compensation. There was here not an exercise of powers under the Act of 1930, and the plaintiff is suing for something quite outside the Act. The jurisdiction of the courts is therefore not ousted. If the contention of the defendants is correct it is impossible to conceive of any action being brought against a catchment board, however negligent. It is for the defendants to establish that the case comes within

(1) [1941] A. C. 74.
(2) (1879) 4 Q. B. D. 433, 443.
(3) (1877) 7 Ch. D. 217.
(4) [1929] 1 K. B. 533; [1930] A. C. 171.
(5) (1859) 7 H. L. C. 600.
(6) [1921] 2 K. B. 213.

C. A.

1949

MARRIAGE
v.
EAST
NORFOLK
RIVERS
CATCHMENT
BOARD.

s. 34, sub-s. 3, and that what they did was in the proper exercise of their statutory powers. The facts found by the judge are entirely against them on that point, and Byrne J. wrongly decided that the nuisance, which he found to be established, fell to be dealt with under s. 34, sub-s. 3. A mere plea of nuisance entitles the plaintiff to contend that the work done by the board was done without reasonable care, but should it be deemed necessary this court has power to permit an amendment of the pleadings, and negligence to be specifically pleaded.

There was a continuing nuisance until the flood waters came down and damaged the plaintiff's bridge in December, 1946, and time under the Limitation Act did not begin to run until that date. [*Geddis* v. *Proprietors of the Bann Reservoir* (1); *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (2); *McClelland* v. *Manchester Corporation* (3); *Smith* v. *Cawdle Fen, Ely (Cambridge) Commissioners* (4); *Lochgelly Iron & Coal Co.* v. *M'Mullan* (5); *Donoghue* v. *Stevenson* (6); *Weld-Blundell* v. *Stephens* (7); *Clowes* v. *Staffordshire Potteries Waterworks Co.* (8); *Trafford* v. *The King* (9); and *Canadian Pacific Railway* v. *Parke* (10) also referred to.]

Diplock K.C. and *R. A. McDonald* for the board. The propositions on which the board rely are, "No "action can be maintained for anything which is done "under the authority of the legislature, and though the act "is one which, if unauthorized by the legislature, would be "injurious and actionable, the remedy of the party who "suffered the loss is confined to the recovering such com-"pensation as the legislature has thought fit to give him": per Lord Blackburn in *Caledonian Railway Co.* v. *Walker's Trustees* (11). What the legislature has authorized is a question of construction of the statute. The series of cases of which *Farnworth* v. *Manchester Corporation* (12); *Geddis* v. *Proprietors of the Bann Reservoir* (1); and *Hill* v. *Managers of the Metropolitan Asylum District* (13) are examples, concern what is the construction of a particular statute, and they are authorities only for the proposition that, where an Act authorizes

(1) (1878) 3 App. Cas. 430.
(2) (1866) L. R. 1 H. L. 93.
(3) [1912] 1 K. B. 118.
(4) [1938] 4 All E. R. 64.
(5) [1934] A. C. 1.
(6) [1932] A. C. 562.
(7) [1920] A. C. 956.
(8) (1872) L. R. 8 Ch. 125.
(9) (1832) 8 Bing. 204.
(10) [1899] A. C. 535.
(11) (1882) 7 App. Cas. 293.
(12) [1929] 1 K. B. 533.
(13) 4 Q. B. D. 433.

specific works and contains no provision for compensating persons who suffer injury, there is a presumption that Parliament did not intend to authorize a violation of common-law rights of third parties, which would include, of course, a violation by trespass or nuisance. In the present case, where there is a plea of exercise of statutory powers, the only question is whether the act complained of is authorized by the statute. The presumption that the legislature has not authorized interference with private rights does not apply to the Land Drainage Act, 1930, because to apply it to that statute would render nugatory the whole of the powers conferred on catchment boards by the Act. The presence of a clause providing for compensation "for injury" in a statute clearly indicates that the statute does authorize the violation of private rights. In holding that the catchment board, in diverting the watercourse, had done something which, if done by a riparian owner, would have been actionable at common law, the judge misdirected himself, because what the board did was authorized by the Act.

[TUCKER L.J.: If the board exercise their powers negligently, in such a way that damage is done far beyond what is necessary, what is the position, apart from the compensation section ?]

If negligence is intended to be the cause of action it must be pleaded, and it has not been. Moreover, the discretion as to whether a particular work shall be executed, and in what way, is a matter for the catchment board alone.

[TUCKER L.J.: Assume the worst possible facts against yourself. Is it your case that the board cannot be negligent ?]

No, but in cases where the board have to exercise their judgment, it is not for the court to say that it would have exercised its discretion differently.

[SINGLETON L.J.: I cannot think that Parliament authorized the board to raise the height of one bank without regard to the level of the other bank. It may be necessary to have a new trial to ascertain the facts.]

It is only submitted that as a matter of law it is in the discretion of the board to decide what they will do, no doubt after taking all matters into consideration. The disposal of the dredgings is a matter for the board and it would not fall within the scope of negligence. It must, of course, be an honest exercise of discretion; but the fact that they have been mistaken does not make the board liable for damage unless they are negligent in carrying out the operation. In the case

C. A.

1949

MARRIAGE v. EAST NORFOLK RIVERS CATCHMENT BOARD.

of Acts authorizing specific works the onus is on the authority to prove the construction of the statute and to show that the work could not be done without violating private rights. In the present case, where general powers are conferred by the statute, it would be impossible for the catchment board to carry out their duties if the argument for the plaintiff were accepted. The day-to-day decisions of the board would be transferred to the courts in the event of objection. Any interference with private rights must violate them, and the Act of 1930 gives compensation for that interference. Not only the question of liability for, but also the amount of, compensation falls within the jurisdiction of the appropriate tribunal under the Lands Clauses Act, and they are outside the jurisdiction of the courts.

Even if an action lay at the suit of the plaintiff it would be barred by the Limitation Act, 1939. The cause of action, if any, arose in December, 1944, by which time all the dredgings had been deposited on the bank. Any failure to remove the deposit after that date was a mere non-feasance for which the board would not be liable: *Smith* v. *Cawdle Fen Commissioners* (1), approved in *East Suffolk Rivers Catchment Board* v. *Kent* (2). There was therefore no continuing cause of action.

[By leave of the court, during the arguments, the statement of claim was amended to include a specific allegation of negligence on the part of the board, on the condition that the allegation was confined to the particulars already delivered.]

Cur. adv. vult.

Nov. 24. TUCKER L.J. [stated the material facts and continued:] The operations, which were completed by January 6, 1944, did not affect the plaintiff until December, 1946, when a flood occurred. As a result of the level of the bank on the south side having been raised, the fields on the north side became flooded and the volume of water in a by-pass channel of the river, which flowed under a bridge on the plaintiff's property to the north of the mill, was greatly increased. The flood waters scoured the by-pass channel and undermined the buttresses of the bridge, causing its collapse. It was for this damage, agreed at 205*l*. 19*s*. 0*d*., that the action was brought.

There were issues at the trial whether the damage complained of was due to the board's dredging operations or was caused by a turbine erected by the plaintiff across the mouth of the by-pass channel and/or by a crest board which the plaintiff was alleged to have installed on the overflow weir. Both these issues were decided favourably to the plaintiff, and the judge stated that he preferred the plaintiff's evidence to that of the board's engineer at all points where they were at variance. The judge found as a fact that by the operations described above the board diverted the ordinary flood course of the river and thus did an act which, if done by a riparian owner, would have been actionable at the suit of another riparian owner. For the purposes of this judgment I am content to assume that the judge's findings as to the diversion of the river were justified on the evidence. Counsel for the board was prepared to argue that on examination of the evidence it would be found that the necessary elements to found an action by a riparian owner were not present, but he submitted that in any event the plaintiff's only remedy was to claim compensation under s. 34, sub-s. 3, of the Land Drainage Act, 1930. As I accept the latter contention, I have not examined the evidence on this point as fully as would otherwise have been necessary, nor have we heard argument on it. In the circumstances the question for decision is whether, on these findings, the judge was right in holding that the plaintiff's only remedy was to claim compensation. This is purely a question of construction of the Land Drainage Act, 1930.

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(1) [1938] 4 All E. R. 61, 64.

(2) [1941] A. C. 74.

The following are the relevant sections of the Act. Section 1, sub-s. 3, provides: "Subject to the provisions "of this Act, a drainage board shall exercise a general super- "vision over all matters relating to the drainage of land "within its district and shall have such other powers and "perform such other duties as are conferred or imposed on "drainage boards by this Act." Section 6, sub-s. 1, provides: "The powers conferred by this Act on drainage boards shall, "so far as concerns the main river, including the banks thereof, "and drainage works in connexion with the main river, be "exercisable solely by the catchment board." Section 12, which I need not read in full, gives the Minister power to give directions with respect to the performance of their duties by the catchment board.

Then comes s. 34, which is the all-important section for present purposes. [His Lordship read sub-ss. 1, 3 and 4 of s. 34, and also s. 38, sub-s. 1, and continued :] It is, I think, clear that the powers conferred by s. 34 necessarily involve the possibility of violation of the legal rights of riparian owners, and that the exercise of those powers and the manner in which they are to be exercised are matters within the discretion of the board. If a riparian owner becomes aware that a catchment board are intending to carry out an operation within the scope of the powers conferred upon them by s. 34, which operation will necessarily or probably involve a violation of his legal rights, can he come to the court and claim an injunction ? I think clearly not. To hold otherwise would be to substitute the decision of the court for that of the board in a matter which the legislature has placed in the discretion of the board and for which it has expressly provided compensation. It is well settled that under language such as is used in s. 34, sub-s. 3, a claimant for compensation must prove that the act complained of is one which, but for the authorization of the statute, would have been actionable. Indeed it was not disputed by counsel for the plaintiff that that is the meaning of the word " injury " in s. 34, sub-s. 3. It is sufficient to cite the language of Lord Blackburn in *Caledonian Railway Company* v. *Walker's Trustees* (1) : " Some things, I think, are now no longer open " to discussion. No action can be maintained for anything " which is done under the authority of the legislature, though " the act is one which if unauthorized by the legislature, " would be injurious and actionable. The remedy of the " party who suffers the loss is confined to recovering such " compensation as the legislature has thought fit to give him : " see *Hammersmith and City Ry. Co.* v. *Brand* (2). The Lands " and Railways Clauses Acts of 1845 give some compensation. " I do not think that there is in this respect any difference " between the legislation for England and for Scotland. And " it must now be considered settled that on the construction " of these Acts, compensation is confined to damage arising " from that which would, if done without authority from the " legislature, have given rise to a cause of action."

The importance of the existence of a compensation clause in determining the intention of the legislature is emphasized by the same judge in *Metropolitan Asylum District Commissioners* v. *Hill* (3), where he says : " The legislature has very often " interfered with the rights of private persons, but in modern

(1) 7 App. Cas. 259, 293.
(2) (1869) L. R. 4 H. L. 171.
(3) 6 App. Cas. 193, 203.

" times it has generally given compensation to those injured ; " and if no compensation is given it affords a reason, though " not a conclusive one, for thinking that the intention of the " legislature was, not that the thing should be done at all " events, but only that it should be done, if it could be done, " without injury to others. What was the intention of the " legislature in any particular Act is a question of the con- " struction of the Act." And it has been decided that, where there is such a compensation clause, and the provisions of the Lands Clauses (Consolidation) Act apply, it is for the arbitrator to decide whether actionable damage has been proved: *East and West India Docks and Birmingham Junction Railway Company* v. *Gattke* (1). It is not disputed that a diversion of the course of a river by one riparian owner is actionable at the suit of another. It follows, in my view, on the construction of this Act, that the plaintiff's remedy for the actionable wrong found by the judge consists only in his right to receive compensation under the provisions of s. 34, sub-s. 3.

In arriving at this decision I have given careful consideration to the arguments to the contrary of Mr. Marshall, for the plaintiff, which I will now consider. He submits that, although the remedy for the violation of a legal right is in general to be found in s. 34, sub-s. 3, this subsection has no application to a case where the damage suffered is caused by a nuisance unnecessarily created by the board in the exercise of their statutory powers, or to negligence on their part, and that, in order to invoke the protection of the Act, the onus is on the board to prove that they acted without negligence and that the nuisance created was necessary to the proper performance of the powers conferred on them by statute. In support of this contention he relies on the well-known words of Lord Blackburn in *Geddis* v. *Proprietors of the Bann Reservoir* (2), where he said: " For I take it, " without citing cases, that it is now thoroughly well established " that no action will lie for doing that which the legislature " has authorized, if it be done without negligence, although " it does occasion damage to anyone ; but an action does lie " for doing that which the legislature has authorized, if it be " done negligently. And I think that if by a reasonable " exercise of the powers, either given by statute to the pro- " moters, or which they have at common law, the damage

(1) (1850) 3 M. & G. 155.

(2) 3 App. Cas. 440, 455, 456.

"could be prevented it is, within this rule, 'negligence' not "to make such reasonable exercise of their powers. I do not "think that it will be found that any of the cases (I do not "cite them) are in conflict with that view of the law"; and of Lord Dunedin in *Manchester Corporation* v. *Farnworth* (1), where he said: "The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, "but the criterion of inevitability is not what is theoretically "possible but what is possible according to the state of scientific "knowledge at the time, having also in view a certain commonsense appreciation, which cannot be rigidly defined, of "practical feasibility in view of situation and of expense."

In neither of these cases, nor in others where similar language is used, was the court concerned with a compensation clause. Where there is no such clause and where the legislature has authorized the execution of specific works, the court will be vigilant to see that an injured party is not deprived of his remedy unless the language of the statute and the nature of the works authorized necessitate such a conclusion. In my view, quite different considerations arise in cases like the present, where the statute to be construed is not concerned with specific works, but is conferring a wide discretion on a statutory authority, necessarily involving interference with the legal rights of riparian owners and expressly providing a remedy by way of compensation for such interference. It is not necessary for present purposes to attach any limitation to the word "injury" in s. 34, sub-s. 3; it is sufficient to say that in my view it includes damage to property suffered by a riparian owner. Nor is it necessary to consider whether the subsection would, on the proper construction of this statute, preclude an action based on allegations of negligence in the carrying out of works lawfully undertaken by the board in the exercise of their discretion under their statutory powers.

The statement of claim alleged that what the board did was done "wrongfully and without right or title." Negligence was not an issue at the trial. During the course of the appeal we allowed the plaintiff to amend para. 3 of his statement of claim by adding the word "negligently" at the end of line 4 of para. 3, on the terms that he was confined to the particulars already delivered. These particulars do not, in my view, disclose a case of negligence in the execution of the works, such as was envisaged in *Kent and Another*

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(1) [1930] A. C. 171, 183.

v. *East Suffolk Rivers Catchment Board* (1), as affording a cause of action to an injured party. In that case no point was taken that the claim, based as it was solely on negligence, could only be maintained under s. 34, sub-s. 3, although du Parcq L.J. in the Court of Appeal, made a passing reference to the subsection and dismissed it as irrelevant. In my view, the addition of the word "negligently" in para. 3 of the statement of claim does not alter the nature of the plaintiff's case as originally pleaded and as determined by the trial judge. It would, I think, be wrong for us, on the material available and without any finding by the judge, to hold that the operation decided upon by the board in their discretion had been negligently carried out. I am accordingly of opinion that the judge was right in holding that the plaintiff's action was not maintainable.

Having regard to the conclusion at which I have arrived as to the effect of s. 34, sub-s. 3, on the plaintiff's claim, it is unnecessary to decide whether, if that claim had been maintainable, the board could have successfully relied on the Public Authorities Protection Act, 1893, as amended by s. 21 of the Limitation Act, 1939. The submission of the board was to the effect that the cause of action found by the judge consisted in the diversion of the course of the river, and it was said that such a cause of action accrues at the moment of diversion and that damage is not a necessary ingredient therein. Accordingly, it was argued that, as no complaint is made of any act or default since January, 1944, the plaintiff's claim is statute-barred. As to that I would only observe that, if this is the result, it adds one more to the many instances of injustice often resulting from this Act. For the reasons stated, I would dismiss this appeal.

Singleton L.J.: The plaintiff alleged that the damage to his bridge was caused by the wrongful deposit by the board of large quantities of soil on the south bank, which prevented overflow water from the river safely escaping in time of flood. His action was based on nuisance. The board admit the deposit of soil and plead that the acts were done by them in the exercise of the powers conferred upon them by the Land Drainage Act, 1930. They plead in para. 4 of the defence that the statement of claim discloses no cause of action, and in para. 5 they rely on s. 21 of the Limitation Act, 1939. The

(1) [1940] 1 K. B. 319; [1941] A. C. 74.

C. A.

1949

MARRIAGE
v.
EAST
NORFOLK
RIVERS
CATCHMENT
BOARD.

Singleton L.J.

claim for an injunction was abandoned at an early stage. The damages claimed amounted to 200*l.*, but the hearing of the action before Byrne J. took more than three days and the argument in this court occupied most of four days. Byrne J. accepted the evidence of the plaintiff in preference to that of the board's engineer. He found that the south side was the side of the river which was always regarded as the safety valve in time of flood—that was the side which flooded first and took off most of the flood water : and he drew attention to the channels on the low ground on that side. He was satisfied that the bridge collapsed because the flood waters scoured the by-pass channel and undermined the buttresses, and that the flood water did that because the south bank had been raised between one foot and two feet by the dredgings taken from the river by the catchment board. The judge added : " Upon the facts I have come to the conclusion that " the catchment board, by their act, diverted the ordinary " flood course of the river, and thus did an act which, had it " been done by a riparian owner, would have rendered that " riparian owner liable to an action ; but, having regard to the " terms of the statute, I am of opinion that no action based " on nuisance will lie against the board, and that the plaintiff's " only remedy is under s. 34, sub-s. 3." On this ground and on the plea based on s. 21 of the Limitation Act he gave judgment for the board.

It is to be observed that there was no express plea that the plaintiff's remedy (if any) was under s. 34, sub-s. 3, of the Act of 1930. It may be said that it is covered by paras 3 and 4 of the defence : for myself I should have preferred to see this pleaded as one answer of the board to the plaintiff's claim. Yet it is right to point out that the board do not admit that the plaintiff is entitled to compensation under s. 34, sub-s. 3. Their contention is that he is not entitled either to damages or to compensation unless he shows an actionable wrong or something which would have been actionable but for the statute ; and they submit that that position never arose. The view of Byrne J. was that the board created a nuisance and that the damage to the plaintiff flowed from that. In this court Mr. Marshall's main submission was based chiefly on the principle stated by Lord Hatherley and Lord Blackburn in *Geddis* v. *Proprietors of the Bann Reservoir* (1), and on the

(1) 3 App. Cas. 430, 450, 456.

statement of the law by Lord Dunedin in *Manchester Corporation* v. *Farnworth* (1) in these terms : " When Parliament has " authorized a certain thing to be made or done in a certain " place, there can be no action for nuisance caused by the " making or doing of that thing if the nuisance is the inevitable " result of the making or doing so authorized. The onus of " proving that the result is inevitable is on those who wish to " escape liability for nuisance." (See also per Lord Sumner (2) and per Lord Blanesburgh (3).) Mr. Marshall submitted that the board had not shown that the nuisance created was the inevitable result of their carrying out work which they were authorized to do, and that consequently the plaintiff had a right of action.

It is necessary to look carefully at the Land Drainage Act, 1930, which is an Act to amend and consolidate the enactments relating to the drainage of land, in order to see (*a*) what powers, rights and duties are given to catchment boards ; (*b*) how the carrying out of those powers, rights or duties may affect various persons ; and (*c*) whether any and, if so, what, remedies are given to persons who may be affected by the operations. The River Waveney is a main river, and thus by s. 6 the powers conferred by the Act on drainage boards can only be exercised by the catchment board. The most important sections of the Act are ss. 34 and 38. Wide powers are given to the board, and it is clear that they have a discretion as to what work they shall undertake, and when ; and, speaking generally, the way or manner in which they shall perform the work is left to them. It is equally clear from the nature of the work that the doing of it may cause nuisance and damage to a number of people. One cannot interfere with the course of a river, or even of a stream, without causing upset : the operation of dredging or cleansing a river or a ditch results in spoil which has to be put somewhere, and that may create a nuisance. This was recognized by Parliament, and s. 34, sub-s. 3, provides that, where injury is sustained by any person by reason of the exercise by a drainage board of any of their powers under the section, the board shall be liable to make full compensation to the injured person in the manner provided. (I do not overlook the limitation imposed by s. 38.) If a public company or any individual obtain an Act of Parliament which they say enables them to take away the common-law rights of any person,

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(1) [1930] A. C. 171, 183.
(2) Ibid. 195.
(3) Ibid. 206, 207.

C. A.

1949

Marriage v. East Norfolk Rivers Catchment Board.

Singleton L.J.

they are bound to show that it does so with sufficient clearness, said Mellish L.J., in *Clowes* v. *South Staffordshire Potteries Waterworks Co.* (1).

I am satisfied that the remedy by way of compensation given by s. 34, sub-s. 3, was intended to cover the kind of case under consideration. I am not sure that it matters whether a violation of a legal right was shown or not: my impression is that the intention of Parliament was to avoid lengthy and costly litigation on questions of this kind and to ensure that anyone who suffered damage in consequence of work done under the powers given by the section should have a right to compensation. After all, the work is undertaken for the benefit of persons in the area; they contribute to the cost of it directly or indirectly; and if one of them suffers damage from the operations he should be entitled to compensation from the general fund. At least it would seem that if damage be sustained through the operations, that will provide prima facie evidence of a right to compensation. I recognize, however, that there may be a distinction to be drawn between "damage," on the one hand, and "injury," as used in s. 34, sub-s. 3, on the other hand. Moreover, it is not necessary to decide this point for the purposes of the appeal, for the judgment of Byrne J. was to the effect that there had been a violation of a legal right, and there was evidence which justified that conclusion. Examination of the Land Drainage Act, 1930, and of s. 34 in particular, leads irresistibly to the view that Parliament recognized that there might be, and frequently must be, a nuisance created by the carrying out of works under the powers given by the section; and compensation for any damage sustained thereby is provided—quite a different case from that to which Lord Dunedin was referring in *Manchester Corporation* v. *Farnworth* (2). It is this which satisfies me that a person who sustains injury through the operations has no right of action for nuisance. On a fair reading of the section it is shown with sufficient clearness that the intention was that the remedy should be by way of compensation alone. I draw attention to the words of Lord du Parcq in *Cutler* v. *Wandsworth Stadium Ld.* (3).

This leaves untouched the question of negligence. No such issue was raised on the pleadings. At the close of the evidence application was made by Mr. Fortune for leave to amend the statement of claim by adding an allegation of negligence.

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(1) (1873) L. R. 8 Ch. 125, 139.

(2) [1936] A.C. 171.

(3) [1949] A. C. 398, 410.

This application was resisted and was refused. Before this court an application to amend was allowed, on the understanding that the plaintiff was limited to the particulars already delivered in the action. As I have said, a wide discretion is given to the board as to how and when they carry out works under the section. *Raleigh Corporation* v. *Williams* (1) is not wholly in point, but it is interesting to see the view of Lord Macnaghten on a matter of this kind. He said (2): "It was argued on behalf of the respondents that "if a drainage work constructed under a by-law duly passed "turns out in the result not to answer its purpose by reason "of the insufficiency of the outlet, or by reason of some other "defect which a competent engineer ought to have foreseen "and guarded against, or if the result of a drainage work is "to damage a person's land by throwing water upon it which "would not otherwise have come there—that is actionable "negligence on the part of the municipality. This argument "in their Lordships' opinion is wholly untenable. On the "other hand, their Lordships do not agree with the argument "of the appellants that municipalities are helpless instruments "in the hands of the engineers they employ. They cannot "indeed modify the engineer's plan themselves. That is no "part of their business. But they may return the plan for "amendment if they think that it is not desirable in the shape "submitted to them. If, however, acting in good faith, they "accept the engineer's plan and carry it out, persons whose "property may be injuriously affected by the construction "of the drainage work must seek their remedy in the manner "prescribed by the statute." I draw attention, too, to *Colak Corporation* v. *Summerfield* (3), and in particular to the words of Lord Watson.

It seems to me that in order to establish a right of action against the catchment board the plaintiff must prove affirmatively that there was negligence in the manner of carrying out the work which had been undertaken. That must be alleged, sufficient particulars must be given and proof supplied. In such circumstances, the damage would be shown to arise from the negligence of those carrying out the work rather than from the operations authorized by the section. It may be questionable how far it is worth while going into such matters in any particular case if the person who has sustained damage

(1) [1893] A. C. 540.
(2) Ibid. 550.
(3) [1893] A. C. 187, 191.

can recover full compensation under s. 34, sub-s. 3. In the initial stages of the action it is probable that counsel had not the material on which to base a plea of negligence. If there had been such an allegation it is difficult to see what particulars would have been given. After the defendants' engineer had been cross-examined there was material on which it can be argued that he ought to have taken more care —and yet it can be said that if the spoil had been placed on the opposite bank someone else might have suffered damage. To establish a case of negligence it must be shown that there was neglect of some care which the board were bound to exercise towards someone, and it is not enough for the plaintiff to say that, if the spoil had been placed somewhere else, he would not have suffered in the way he did. The general position must be borne in mind, and the standard of care required is that of a reasonably competent man carrying out work of this kind with due regard for the rights of all. Unless there is shown to be a breach of that, the plaintiff does not prove negligence. I am not prepared to hold, on the evidence, that it is necessary in every such case that levels be taken before material is deposited on the bank of a river. It may be desirable in some cases, but that is far from saying that failure to take levels in a particular case amounts to negligence. Those responsible for the operations are entrusted with a certain amount of discretion as to how they do the work. It is not without importance to notice that no damage occurred for nearly three years after the deposit was made. I do not think that this court, on the material before it, ought to find negligence against the board.

Mr. Marshall pressed upon us that sub-s. 3 of s. 34 only applied to the quantum of compensation—an attractive argument in view of the wording of the subsection—but I see no reason why we should not follow the law as stated in *Rhodes* v. *Airedale Drainage Commissioners* (1), and in *Hall* v. *Bristol Corporation* (2), which was adopted by Byrne J. Assuming, as the trial judge found, that the plaintiff proved a nuisance created by the board, it arose from operations authorized by the statute, and a remedy by way of compensation is provided by the statute. That I regard as an answer to the claim. I do not think it necessary to determine the further point raised under the Limitation Act, 1939. I agree that the appeal should be dismissed.

(1) (1876) 1 C. P. D. 380, 402.

(2) (1867) L. R. 2 C. P. 322.

JENKINS L.J.: In order to maintain his action at all, it was necessary for the plaintiff to show that the deposit by the defendant board on the south bank of the River Waveney of the spoil raised in dredging the river above his mill was in the nature of an actionable wrong, which, if done by a person without statutory powers, would have entitled him to sue that person for the resulting flood damage to his bridge. This question the judge decided in favour of the plaintiff, holding on the facts that the board " by its act diverted the " ordinary flood course of the river, and thus did an act which, " had it been done by a riparian owner, would have rendered " that riparian owner liable to an action." For authority in support of this proposition he referred to *Menzies* v. *Breadalbane* (1) and *Bickett* v. *Morris* (2) as showing that " interference with a regular flood channel which formed part " of the bed of the river " would be actionable at common law, whereas an erection on the bank of the river which merely prevented flood water from flowing at large over a riparian owner's land, without obstructing any existing flood channel, would not be actionable at common law by the person to whose land the flood water was diverted in consequence of the erection. See *Gerrard* v. *Crowe* (3) and *Rex* v. *Commissioners of Sewers for the Levels of Pagham* (4).

In his review of the authorities in *Gerrard* v. *Crowe* (3), Lord Cave treated *Menzies* v. *Breadalbane* (1) as a case where there was " a regular flood channel which though dry when the " river was low became filled with water at times of flood," observing that it was plain that " such a channel forms part " of the alveus of the river and cannot be obstructed," and described *Bickett* v. *Morris* (2) as a case of injury to the alveus. He also expressed disapproval of the view expressed by Lord Tenterden C.J. in *Rex* v. *Trafford* (5) to the effect that " no sound distinction can be drawn between the " ordinary course of water flowing in a bounded channel at " all usual seasons and the extraordinary course which its " superabundant quantity has been accustomed to take at " particular seasons." In the actual case of *Gerrard* v. *Crowe* (3) the flood water diverted by the respondent's protective works from his land to that of the appellant seems formerly

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(1) (1828) 3 Bli. N. S. 414.

(2) (1866) L. R. 1 Sc. & D. 47.

(3) [1921] 1 A. C. 395.

(4) (1828) 8 B. & C. 355.

(5) (1831) 1 B. & Ad. 887.

C. A.

1949

Marriage v. East Norfolk Rivers Catchment Board.

Jenkins L.J.

to have flowed from the river over the respondent's land and thence into the river again, but not by any defined channel; and the respondent's works were held by the Privy Council to afford the appellant no cause of action. I think that it must therefore be regarded as settled that, to be actionable, an erection on the bank of a river must be shown to obstruct a defined channel through which flood water is accustomed to flow, and not merely to prevent flood water from flowing at large over land adjoining the river and thence back into the main stream, although this may be the course which the flood water is accustomed to take.

After stating the law, as it seems to me quite correctly, the judge expressed his finding in ambiguous terms in speaking as he did of the diversion of "the ordinary flood "course of the river," which might refer either to the existence of a defined channel through which flood water normally went, and which was obstructed by the deposit of spoil, or merely to the flowing of flood water at large over the land in question and from it back into the river below the mill, which was prevented by the deposit of spoil. I cannot say that I am satisfied that the evidence justifies a finding to the former effect. The plans are inconclusive. They show what appear to be drainage channels traversing the marsh land, which unite and enter the river below the mill; but none of these channels seems to communicate with the river above the mill. These channels may therefore have been made simply fcr the purpose of draining off from the land in question any flood water which might happen to come upon it, and never have performed the function of supplementary alvei for the river in time of flood. However, for the purposes of this appeal I am content to assume that the judge intended to find on the facts that the deposit obstructed a defined flood channel, and further to assume that his finding is justified by the evidence. On these assumptions it follows from what I have said above that the judge rightly held that the deposit of the spoil by the board would have constituted an actionable wrong at common law. On the assumption that what was done by the board would, if done by a private individual, have constituted an actionable wrong, the next question is whether, as the judge has held, the effect of the Land Drainage Act, 1930, from which the board derive their existence and powers, is to deprive the plaintiff of the right of action which he would otherwise have had against the board, and leave him to the remedy by way of compensation provided by s. 34, sub-s. 3, of the Act.

It was argued for the plaintiff that he was not so deprived: (i.) because the deposit of the spoil on the south bank in a continuous line (that is to say, without gaps, or without any adequate gaps, for the escape of flood water) constituted a nuisance to the plaintiff and the Act does not authorize the board to commit a nuisance (this being in substance the whole of the plaintiff's case as pleaded and as argued below, where leave to amend by alleging negligence was refused by the judge); and (ii) (an allegation of negligence on the same facts having been introduced by amendment with the leave of this court) because that deposit was a negligent act on the part of the board, and the statute does not authorize the board to commit negligent acts. I do not think that the argument is really much advanced by describing what was done by the board as a nuisance. All that means is that the deposit of the spoil on the south bank constituted a source of danger to the plaintiff's property in time of flood, to which the board were not entitled to subject him; but, unless the deposit had the effect of obstructing a defined flood channel, to the unobstructed benefit of which the plaintiff was entitled, any resulting flood damage to the plaintiff's property would be mere damnum sine injuria; so that the allegation of nuisance really comes to no more than an allegation of wrongful obstruction by the board of a defined flood channel.

The allegation of negligence, if I may be allowed, so to speak, to write it out in full, amounts, as I understand it, to an allegation that the board, being under a duty to the plaintiff not to damage his property by their drainage operations, wrongfully and in breach of that duty deposited the spoil in a continuous line on the south bank when they knew or ought to have known that the consequent heightening of the south bank would have the effect of diverting flood water to the opposite side of the river, and increasing the flow of water through the by-pass channel in time of flood, with possible damage to the plaintiff. But here, again, the board's duty to the plaintiff in this matter (on breach of which the claim in negligence depends) cannot, so far as I can see, be put higher than a duty to refrain from blocking any defined flood channel to the unobstructed benefit of which the plaintiff was entitled. If the deposit did obstruct any such channel, the board (apart from the Act) would be equally liable, whether they knew or ought to have known of the existence of such a channel and the probable consequences of blocking it or not; and the allegation of negligence (or, in other words, the allegation that the board knew or ought to have known of the existence of the flood channel and the probable consequences of its obstruction) therefore adds nothing to the cause of action, except in so far as it affords ground for the contention that the wrong here complained of, being in the nature of a negligent act, is, according to the authorities to which I am about to refer, an act in respect of which the board are not entitled to claim immunity from suit by virtue of the Land Drainage Act, 1930. If, on the other hand, all that the deposit did was to prevent flood water from flowing at large over the marshland to the south of the river, then there was no duty to the plaintiff in the matter and the question of negligence does not arise. In this latter alternative any claim which the plaintiff might have could only be in respect of some new right conferred by the statute, for breach of which the remedy by way of compensation conferred by the statute would plainly be exhaustive.

Therefore, whichever way the case is put, I think that the question is substantially the same, namely, whether the Land Drainage Act, 1930, prevents the plaintiff from suing the board for the otherwise actionable wrong of depositing the spoil on the south bank so as to obstruct a defined flood channel (or, in other words, a channel forming part of the bed of the river in times of flood), to the unobstructed benefit of which the plaintiff was entitled for the protection of his property from flood damage, and substitutes for the ordinary right of action a claim to compensation under s. 34, sub-s. 3. The grounding of the plaintiff's case on nuisance or negligence (as opposed to trespass to the plaintiffs rights in respect of the flood channel as a riparian owner) is in effect an invocation of the general principle that Acts of Parliament by which statutory powers are conferred should not be construed as absolving those invested with them from liability, enforceable by action in the courts, in respect of any avoidable injury to others occasioned by the exercise of the powers.

We were referred to a number of well-known authorities in which this principle has been enunciated and illustrated, and in particular to *Geddis* v. *Proprietors of the Bann Reservoir* (1), where Lord Hatherley said: "I apprehend that the true

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(1) 3 App. Cas. 430, 450.

"construction of all such powers given to companies is this: "You may carry out your work to its full extent, and in some "cases you must carry it out to its fullest extent, in the manner "provided by the Act, but in so doing you shall not create "any needless injury; you shall use all those precautions "against injury to others which you would use against injury "to yourself in carrying on a similar work, and if we find that "in carrying out your powers damage has been done by you, "the law will say that the powers which you can exercise "shall be exercised for the prevention of mischief." Lord Blackburn said (1): "For I take it, without citing cases, "that it is now thoroughly well established that no action "will lie for doing that which the legislature has authorized, "if it be done without negligence, although it does occasion "damage to anyone; but an action does lie for doing that "which the legislature has authorized, if it be done negligently. "And I think that if by a reasonable exercise of the powers, "either given by statute to the promoters, or which they have "at common law, the damage could be prevented, it is, within "this rule, 'negligence' not to make such reasonable exercise "of their powers. I do not think that it will be found that "any of the cases (I do not cite them) are in conflict with "that view of the law."

The cases cited on this aspect of the matter also included *Manchester Corporation* v. *Farnworth*, where Lord Dunedin said (2): "When Parliament has authorized a certain "thing to be made or done in a certain place, there can "be no action for nuisance caused by the making or "doing of that thing if the nuisance is the inevitable result "of the making or doing so authorized. The onus of "proving that the result is inevitable is on those who wish "to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible, "according to the state of scientific knowledge at the time, "having also in view a certain common-sense appreciation "which cannot be rigidly defined, of practical feasibility in "view of situation and of expense." We were also referred to *East Suffolk Rivers Catchment Board* v. *Kent* (3), where the earlier authorities are reviewed.

The general principle is thus well settled, but its application in any particular case must depend on the object and terms of

(1) 3 App. Cas. 430, 455.
(2) [1930] A. C. 171, 183.
(3) [1941] A. C. 74.

C. A.

1949

MARRIAGE
v.
EAST
NORFOLK
RIVERS
CATCHMENT
BOARD.

Jenkins L.J.

the statute conferring the powers in question (including the presence or absence of a clause providing for compensation and the scope of any such clause), the nature of the act giving rise to the injury complained of, and the nature of the resulting injury. I venture to think that the questions which arise in any given case of this kind are substantially these: first, was the act which occasioned the injury complained of authorized by the statute?; secondly, did the statute contemplate that the exercise of the powers conferred would or might cause injury to others?; thirdly, if so, was the injury complained of an injury of a kind contemplated by the statute?; and, fourthly, did the statute provide for compensation in respect of any injury of the kind complained of sustained through the exercise of the powers conferred? If the answers to all these questions are in the affirmative then, I think, it must follow that the party injured is deprived of his right of action and left to his remedy in the form of compensation under the statute.

To answer them in the above order in relation to the present case: first, the board clearly had power to dredge the river and deposit the spoil on the south bank under s. 6, sub-s. 1, s. 34, sub-s. 1, and s. 38 of the Act. Secondly, I think it manifest that the Act did contemplate that the exercise of the powers conferred on the board would or might cause injury to others. It is clear that operations of the kind contemplated by s. 34 must inevitably interfere with the rights of riparian owners by altering the flow of the river and its behaviour in times of flood or drought, quite apart from the direct interference with rights of property involved in some of the works specifically mentioned. The presence of the provision in s. 34, sub-s. 3, to the effect that the board must make full compensation where injury is sustained by any person by reason of the exercise by the board of any of their powers under the section in itself shows that the Act contemplates that legal rights may be infringed; and the provisions of s. 61, which prohibit the board, except with the consent of the undertakers, from doing any work which, whether directly or indirectly interferes with, or with the use of, the works or property of various specified types of undertaking in such manner as to affect injuriously the said works or property, necessarily imply that in other cases the board may execute works notwithstanding that they interfere, or will interfere, with property so as to affect it injuriously.

C. A.

1949

MARRIAGE
v.
EAST
NORFOLK
RIVERS
CATCHMENT
BOARD.

Jenkins L.J.

Thirdly, I think that the injury complained of by the plaintiff was clearly of a kind contemplated by the Act. It was an injury in the shape of flooding (that is, an injury in the matter of drainage in the statutory sense) occasioned by a drainage operation in the shape of the dredging and deposit of spoil. I do not think that it can be removed from the category of injuries contemplated by the Act merely on the ground that the spoil could have been deposited elsewhere or differently disposed on the south bank, or on the ground that the board knew or ought to have known that the spoil, deposited as it was, would have the effect of increasing the danger to the plaintiff's property of damage in times of flood. There is, I think, an important distinction for this purpose between (A) statutory powers to execute some particular work or carry on some particular undertaking (for example, the construction and operation of the reservoir, in *Geddis* v. *Proprietors of Bann Reservoir* (1), the provision of hospitals, in *Metropolitan Asylum District Managers* v. *Hill* (2) and the construction and operation of the generating station, in *Manchester Corporation* v. *Farnworth* (3); and (B) statutory powers to execute a variety of works of specified descriptions in a given area (the works in question being of such a kind as necessarily to involve some degree of interference with the rights of others) as and when the body invested with the powers deems it necessary or expedient to do so in furtherance of a general duty imposed on it by the Act (for example, the powers conferred on the board in the present case by s. 6, sub-s. 1, and ss. 34 and 38 of the Land Drainage Act, 1930, to execute works of the various descriptions therein mentioned in furtherance of the general duty imposed on them by the Act (as appears by necessary implication from s. 12) of maintaining the main river in a due state of efficiency).

In cases of the former class, the powers are, in the absence of clear provision to the contrary in the Act, limited to the doing of the particular things authorized without infringement of the rights of others, except in so far as any such infringement may be a demonstrably necessary consequence of doing what is authorized to be done. Thus, power to construct and operate a reservoir and pass water from it down a prescribed channel does not authorize the passing of water down the channel without keeping it in a fit condition to receive

(1) 3 App. Cas. 430.
(2) 6 App. Cas. 193.
(3) [1930] A. C. 171.

C. A.

1949

MARRIAGE
v.
EAST
NORFOLK
RIVERS
CATCHMENT
BOARD.

Jenkins L.J.

the water so as to avoid the flooding of adjoining lands: *Geddis'* case (1); power to provide hospitals does not authorize the provision of a fever hospital in a populous place in which it will be a nuisance to neighbouring inhabitants: *Hill's* case (2); and power to construct and operate a generating station does not authorize the undertakers to carry it on so as to create a nuisance by smoke and fumes, except in so far as it may be demonstrably impossible to carry on the generating station without creating such a nuisance: *Farnworth's* case (3): In cases of the latter class, such as the present, it is obvious that, if the powers are subjected to an implied limitation to the effect that they are not to be exercised so as to cause any avoidable infringement of the rights of others, the powers will in great measure be nullified and the manifest object of the Act will be largely frustrated. Thus, if the board in the present case could be sued in the courts, every time they dredged a reach of the river and deposited the spoil on one or other of the banks, by any riparian owner who could show that the effect of what had been done was to obstruct a flood channel and thereby increase the risk of damage to his premises by flood water, on the footing that this was an actionable wrong, notwithstanding the statute, the board could in every such case be restrained by injunction from carrying out the work. The injury, or apprehended injury, would, moreover, always be avoidable by abandonment of the particular project, however beneficial that project might be to riparian owners other than the complainant, and the board would therefore never be able to defeat the complainant on the ground that the injury or apprehended injury was an unavoidable consequence of the exercise of their statutory powers.

In the absence of any provision in the Act for compensating persons injured by the exercise of the board's powers, difficult questions might arise as to the extent (if any) to which the Act should be regarded as depriving a person thus injured of his ordinary remedy in the courts, inasmuch as he would, if so deprived, be wholly without remedy. But the Act including, as it does, a provision for compensation in the shape of s. 34, sub-s. 3, the considerations above stated seem to me to lead irresistibly to the conclusion that the intention of the Act was to make the board, acting in good faith and within their powers, the sole judge of what was necessary or proper to

(1) 3 App. Cas. 430.
(2) 6 App. Cas. 193.
(3) [1930] A. C. 171.

be done in the way of drainage operations for the benefit of their catchment area as a whole and, within limits which I will endeavour to define below, to deprive persons injured by any exercise of the board's powers of their ordinary remedy by way of action, and substitute the remedy by way of compensation prescribed by s. 34, sub-s. 3.

The limits outside which the ordinary rights of action remain are, I think, these: (*a*) the injury must be the product of an exercise of the board's powers as such, as opposed to the product of some negligent act occurring in the course of some exercise of the board's powers but not in itself an act which the board are authorized to do. For example, an injury caused by flooding on one side of the river due to the heightening by the board of the bank on the other side would be a proper subject of compensation, as opposed to action in the courts; but an injury caused by the negligent driving of one of the board's lorries bringing materials to the site would be actionable in the ordinary way. (*b*) The injury must be the product of the operation which the board intended to carry out, and not of some unintended occurrence brought about in the course of carrying out the work owing to negligence in carrying it out. Thus, if the board dig a drain which when dug as planned has the effect of depriving a riparian owner of the full supply of water from the river to which he is entitled, the remedy of the riparian owner will be compensation under the Act, not action in the courts; but if, through negligence in digging the drain, the board undermined and breached a dyke, and thereby inundated the countryside, I apprehend that they could not claim, by way of defence to an action by a person whose land was flooded, that the breaching of the dyke brought about by their negligence, and forming no part of the operation in hand, was done in exercise of their statutory powers, and therefore a matter for compensation, not action. (*c*) The operation must not be one which on the face of it is so capricious or unreasonable, or so fraught with manifest danger to others, that no catchment board acting bona fide and rationally, not recklessly, would ever have undertaken it. The last of these three limitations or requirements inevitably introduces questions of degree, but, as will be seen from the terms in which I have stated it, I think that a very strong case of something amounting to reckless conduct on the part of the board must be made out to enable an action to be maintained on account of an injury which, in the other two respects which I have mentioned, is a matter for compensation under the Act as opposed to action in the courts.

I do not think that this view involves any inconsistency with the authorities on the subject of negligence in the exercise of statutory powers. None of these decisions has gone to the length of holding—and I do not think that any of the parties to them would have held—that under the Land Drainage Act, 1930, or under any Act in comparable terms conferring powers which involve infringement of the rights of others, and providing for the compensating of persons injured by the exercise of those powers, any error of judgment or lack of foresight whatsoever on the part of the statutory authority in the planning of an operation within their powers suffices to make an injury resulting from the operation, when completed as planned, a matter for action in the courts notwithstanding the statutory provisions for compensation; or, in other words, so far as the Land Drainage Act, 1930, is concerned, to prevent the injury in question from being an injury sustained by reason of the exercise by a drainage board of any of their powers within the meaning of s. 34, sub-s. 3. In the present case the injury sustained by the plaintiff was sustained by reason of a normal drainage operation carried out in the usual way, that is to say, the operation of dredging and depositing the spoil along the bank. The injury might have been avoided if the spoil had been differently disposed. The effect of depositing the spoil on the south bank was to make that bank a foot or two higher than the north bank, instead of a foot or two lower as formerly, with the obvious consequence of increasing the liability of the north bank to flooding. The prospect of serious damage to the plaintiff in times of flood through the increased flow along the by-pass channel spanned by his bridge was less apparent and clearly did not amount to an imminent risk, since the work was completed in January, 1944, and the damage did not occur till December, 1946. I cannot regard the facts as bringing home to the board anything worse than an error of judgment in underestimating the effect which the heightening of the south bank at this particular point on the river might have in times of severe flood. In my view an error of judgment of that order falls very short of the degree of negligence or reckless conduct on the part of the board which is required to remove the injury sustained from the category of injuries covered by the compensation provision.

Fourthly, it follows from what I have said above in discussing

C. A.
1949
Marriage
v.
East
Norfolk
Rivers
Catchment
Board.
Jenkins L.J.

the other three questions that, in my view, the provision for compensation which the Land Drainage Act, 1930, contains in the shape of s. 34, sub-s. 3, does provide for compensation in respect of an injury of the kind complained of by the plaintiff in this case. Having thus arrived at affirmative answers to the four test questions stated above, I am of opinion that the judge was right in his conclusion to the effect that the action was not maintainable, and that the plaintiff's proper and only remedy for the injury of which he complained was to claim compensation under s. 34, sub-s. 3, of the Act. The judge also considered and upheld the board's contention that the action, if otherwise maintainable, would in any event be barred by s. 21 of the Limitation Act, 1939, on the ground that the cause of action accrued once and for all on the date when the deposit of spoil on the south bank was completed, that is to say, more than a year before action brought. This is a point of considerable technicality and difficulty, and I prefer to refrain from expressing on it an opinion which, either way, could not affect my conclusions as to the result of the present appeal, which, for the other reasons I have endeavoured to state, in my view fails and should be dismissed.

Appeal dismissed.
Leave to appeal
to House of Lords.

Solicitors for plaintiff: *Butt and Bowyer, for Daynes, Keefe and Durrant, Norwich.*

Solicitors for defendant: *Church, Adams, Tatham & Co., for Sprake and Chadwick, Norwich.*

A. W. G.

Applied. MIDDLETON *v.* BALDOCK. [1950] 1 All E.R. 708.

Distinguished. MIDDLETON *v.* BALDOCK [1950] 1 K. B. 657

Considered. THOMPSON *v.* EARTHY [1951] 2 K. B. 596

OLD GATE ESTATES LD. *v.* ALEXANDER AND ANOTHER.

C. A.
1949
Oct. 31.
Bucknill, Somervell and Denning L.JJ.

Landlord and tenant—Rent restriction—Possession—Surrender—Husband statutory tenant—Departure from flat leaving furniture—Wife's continued occupation notwithstanding husband's revocation of authority to her to occupy—Husband and wife sued for recovery of possession—Husband's return to wife and flat—Possession of flat not given up by husband—Rent Restriction Acts applicable.

The statutory tenant of a flat, after matrimonial disputes, ceased, himself, to reside at the flat but left his wife and his furniture there. Subsequently, he wrote to the landlords that he had given up possession of the flat to them and that he enclosed the key; but in fact he did not send them the key. He ceased to pay rent. Later he handed to the landlords, for their use, a document by which he purported to revoke any authority or leave which he might at any time have given to his wife to occupy the flat. The wife refusing to leave the flat at the landlord's request and the husband's furniture still remaining there, the landlords sued the husband and wife for the recovery of possession of the flat. Between the date of the entry of the plaint and the hearing of the action, the husband returned to his wife and the flat.

Held, that, at the time of the entry of the plaint, his wife and furniture remaining at the flat, the husband was still in possession of it as a statutory tenant and, therefore, within the protection of the Rent Restriction Acts.

Brown v. *Draper* [1944] K. B. 309, followed.

Per Bucknill L.J.: So long as the furniture was there, the husband retained possession to that extent. In the absence of circumstances showing that the wife was in the wrong and had forced her husband to leave her, it was to be doubted whether the revocation of authority to his wife to occupy the flat, as the matrimonial home, had any legal effect.

Per Somervell L.J.: As the wife and furniture had remained in the house, it was unnecessary to decide what would have been the position in law if the husband had cleared the flat of his furniture, and the wife had then insisted on continuing to reside at the unfurnished flat and the husband had thereupon given to the landlords, for their use, a revocation of his authority to his wife to occupy the flat.

Per Denning L.J.: A wife has a very special position in the matrimonial home. She is not the sub-tenant or licensee of her husband. It is his duty to provide a roof over her head. He is not entitled to tell her to go, without seeing that she has a proper place to which to go. He is not entitled to turn her out without an order of the court: see *H.* v. *H.* (1947) 63 T. L. R. 645. Even if she stays there against his will, she is lawfully there; and, so long as she is lawfully there, the flat remains subject to the Rent Restriction Acts and the landlord can only obtain possession of it if the conditions laid down by those Acts are satisfied.

APPEAL from Marylebone county court.

The plaintiffs were the landlords of a flat at Dudley Court, Upper Berkeley Street, which they let to the male defendant unfurnished on August 19, 1941, for three years at a rent of 130*l.* p.a. At the end of the term he continued in occupation of the flat, though the rent was then raised to 150*l.* p.a. It was admitted in the county court, and not disputed in the Court of Appeal, that the male defendant was a statutory tenant. In November, 1948, there were serious matrimonial disputes between him and his wife and he left the flat, leaving there his wife and his furniture. On December 18, 1948, he wrote to the landlords that he was giving up the tenancy and that he would not be responsible for the rent on and after December 25, 1948. The landlords replied that under the Rent Restriction Acts he was required to give three months' notice to terminate the tenancy, but that he could, if he wished, give up possession of the premises; and they asked him to sign the letter enclosed :—" As arranged with you, I confirm " that I have given up possession of the above flat to you, " and enclose the key relating to the premises." The tenant signed that letter and sent it to the landlords, but he did not enclose or send to them the key. The landlords failed to induce the female defendant (the tenant's wife) to leave the flat, for she claimed that she was the tenant, and was willing to pay the rent. On March 8, 1949, the plaintiffs' solicitors wrote thus to the tenant referring to an interview which they had had with him on March 3 : " As we then " explained it is not possible for you to effectively deliver " up possession of the flat . . . . by giving notice to " quit or signing a statement that you are in fact giving " up possession, since there remains in the flat your " furniture, and your wife, who, in this respect, is impliedly " there with your authority. We understand that it will " not be possible for you to remove your furniture. As " a result, we regret that, in the event of proceedings " being taken, as is our clients' intention, it will be " necessary to join you as a party as well as your wife. " It would materially assist our clients if you would sign " a revocation of your wife's authority." They enclosed a document for that purpose addressed to the wife and stating : " Please take this as formal notice of the revocation of any " authority or leave which I may at any time have granted " or given to you to occupy the said flat." The tenant signed that document on March 11, 1949, and returned it to the plaintiffs' solicitors for their use.

On April 1, 1948, in the county court the plaintiffs claimed recovery of possession of the flat from both the tenant and his wife. At the end of April, 1948, the tenant returned to reside at the flat with his wife. At the subsequent hearing, deputy judge Gordon-Clark held that the tenant had given up possession of the flat to the landlords before they took these proceedings; that the Rent Restriction Acts were therefore not applicable; and that the defendant wife was a trespasser. Accordingly he made an order for the recovery of possession of the flat by the landlords.

The tenant and his wife appealed.

Share for the defendants. On this evidence, it is clear that the husband was still in possession of the flat, as a statutory tenant, when the landlords sued for recovery of its possession: *Brown* v. *Draper* (1). The husband's furniture was still on the premises as a symbol of his possession [*Brown* v. *Brash* (2) referred to]. Further, the husband left his wife in the matrimonial home, and he cannot determine his authority to his wife to live there, until he has provided for her another such home. The wife was entitled to remain there, because she was the tenant's wife and, since she remained there, the husband continued as statutory tenant of the premises. The wife is not a mere licensee of her husband. Although a man may not retain possession of a flat within the meaning of the Rent Restriction Acts by the occupation of his wife's or his own relatives (see *Skinner* v. *Geary* (3)), he does so by the occupation of his wife. The wife has an irrevocable authority, as an agent of necessity, to pledge her husband's credit to provide herself with necessaries, the first of which is a roof over her head: see the cases collected in Halsbury's Laws of England (2nd ed.) vol. 16, at pp. 699–700; and if with that knowledge a husband leaves his wife in his flat, it is clear that he retains possession of it. [DENNING L.J. referred to *H.* v. *H.* (4).] In *Robson* v. *Headland* (5) a tenant left a flat with no intention of residing there again, but his former wife, who had divorced him, continued to reside at the flat with a child of the marriage. The landlord gave the tenant notice to quit and sued for possession. The tenant claimed the protection of the Rent Restriction Acts, but failed in his contention. Tucker L.J., however, reserved for future consideration the question which might arise where the licensee in occupation of the premises was at the material time the wife of the tenant. He said: "It may be possible that some other test may have to be

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(1) [1944] K. B. 309.
(2) [1948] 2 K. B. 247.
(3) [1931] 2 K. B. 546.
(4) (1947) 63 T. L. R. 645.
(5) (1948) 64 T. L. R. 596.

"applied in such cases so that the occupation o. the wife "may be regarded in law as that of the husband." Cohen L.J. said that it might be that in such circumstance the obligation of the parties as regards the matrimonial home would have enabled a wife to get over the difficulty in which she found herself in the present case; but he expressed no opinion as to what should be the proper answer when that question arose.

David Lloyd for the landlords. The judgment of the county court judge was right. It is not suggested that the male defendant gave up possession of the flat until March 11, 1949, when he signed the revocation of his authority or permission to his wife to live at the flat. That, with what had happened earlier, amounted in law to a surrender of the flat. He did not intend to return to the flat himself: there was no animus revertendi. As to the furniture, Asquith L.J., in delivering the judgment of the court in *Brown* v. *Brash* (1), when speaking of an absent tenant, said (2): "It may be "that the same result can be secured"—that the tenant retains possession—"by leaving on the premises as a deliberate "symbol of continued occupation, furniture; though we are "not clear that this was necessary to the decision in *Brown* "v. *Draper* (3)." But here the tenant took every step he could to show that he had given up possession and surrendered it to the landlords. The furniture on the premises was certainly not, "a deliberate symbol of continued occupa-"tion." Even if the furniture could be said to be a corpus possidendi, it is plain here that, at the time when the landlords sued him, there was no animus revertendi: all the correspondence is inconsistent with an animus revertendi on the part of the husband, who only returned to his wife and flat on changing his mind after the landlords had entered their plaint.

Share in reply. In *Brown* v. *Draper* (3) a husband had ceased to reside at a flat after matrimonial disputes with his wife, and, when the landlords sued the wife, gave evidence that he had no interest in the house. Yet it was held that the husband was still in possession.

BUCKNILL L.J.: It is clear, I think, that, if the tenant, the husband, had given up possession of the flat by the time when the summons was issued, this case does not fall within the Rent Restriction Acts. On the other hand,

(1) [1948] 2 K. B. 247.
(2) [1948] 2 K. B. 247, 255.
(3) [1944] K. B. 309.

Bucknill L.J.

if he had not given up possession, then the case comes within the Rent Restriction Acts and the deputy judge could not, on the material before him, have granted possession. The judge has dealt with the case on the assumption that the Rent Restriction Acts did not apply and that this was an ordinary case in which the husband had given up possession and the wife was in effect a trespasser.

The authorities on the point which were reviewed by the judge laid down propositions which are familiar in this court. The case which is of most assistance is that of *Brown* v. *Draper* (1) where the facts were not unlike those in this. There, a husband was a tenant of a house on a weekly tenancy. He, as in this case, left the house in a dispute with his wife, and he left his wife and child in occupation of the house with the use of his furniture, and continued to pay rent. He received notice to quit from the landlord and then stopped paying the rent. He did not revoke his leave to the wife to reside in the house, nor did he remove his furniture. The landlord later brought proceedings against the wife for trespass and at the hearing the husband, who was not made a party to the proceedings, gave evidence that he had no interest in the house. The Court of Appeal held that the husband was still in possession of the house, and that the only way he could be deprived of the protection of the Rent Restriction Acts was by his going out of possession or by his having an order for recovery of possession made against him. There are differences in the facts of the two cases; for instance, the proceedings in that case were merely against the wife for trespass; but the following passages in the judgment of Lord Greene M.R. throw some light on this case (2): "This appeal raises a novel and interesting "point under the Rent Restriction Acts. It is convenient "to consider the position of the husband himself under the "Acts, in the light of the facts. If he had given up possession "of the house to the plaintiff on the expiration of the notice "or subsequently, he would have placed himself outside the "protection of the Acts since that protection is based on the "statutory restriction on the power of the court to make an "order for recovery of possession. If the tenant voluntarily "gives up possession, no occasion for the operation of the "statutory restriction arises. The landlord takes possession "without the necessity of obtaining an order of the court,

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(1) [1944] K. B. 309.
(2) Ibid. 312.

"and there is nothing in the Acts which prevents him from "doing so. But the husband did not give up possession. "He not only left the wife in occupation without taking any "steps to revoke the licence which he had given her to continue "living there, but he left his furniture in the house in her "charge." Later, Lord Greene said (1): "This argument "raises an important question, the answer to which will affect "many cases of common occurrence. We will take one "example. The tenant of a house held for a fixed term goes "abroad on military service, leaving his wife in the house. "While he is abroad, the lease comes to an end. At common "law the wife thereupon becomes a trespasser and the landlord "can take proceedings to recover possession from her. Do the "Rent Restriction Acts prevent the landlord from taking "this course? In our opinion, they do. If the contrary "were true, the consequences would be lamentable. In such "a case the possession of the wife must, we think, be regarded "as the possession of the husband and cannot be treated as "unlawful so long as the husband has the right to claim the "protection of the Acts. As we have already pointed out, "the only ways in which the husband can lose the protection "of the Acts are by giving up possession, which in the case "assumed he can only do by removing his wife (or, perhaps, "by revoking his permission to her to live there) and removing "any furniture, etc., which belongs to him, or by having an "order for possession made against him. The right conferred "on the husband to claim the benefit of the Acts entitles him, "if, at the expiration of the tenancy, he remains in possession "(and possession by his licensee or by leaving, for example, "his furniture in the house is sufficient for that purpose), "to remain in possession of the house unless and until an order "is made against him, and the landlord is no more entitled "to treat his licensee as a trespasser than he is entitled to "treat the tenant himself as a trespasser." It appears to me that the passages which I have read are appropriate to the present case because, in the first place, the husband did nothing towards removing the furniture in the flat, and so long as it was there he retained possession to that extent. It was not open to the landlords to let the flat unfurnished while the furniture was there and the husband had done nothing at all to attempt to remove it, nor do I think that he could remove his wife. It is not suggested that he could remove her otherwise than by breaking the law and forcibly carrying her out. It is not necessary for this court to decide whether he could lawfully revoke his permission to her to live there, but, in the absence of circumstances showing that she was in the wrong and had forced him to leave her, I should doubt whether the revocation of permission to an innocent wife to occupy the matrimonial home in which the husband had lived with her and from which he had deserted her would have any legal effect. However, it is not necessary to decide that point.

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(1) [1944] K. B. 314.

In my judgment the judge was wrong in holding, as he did, that the husband had given up possession in this case ; I think that he had not. That being so, I think that this appeal should be allowed.

Somervell L.J. : I agree, and I agree with the deputy judge that the point in this case is whether possession was given up by the husband before the summons was issued—it is not suggested that it was given up afterwards—because in my view, if possession was not given up then, the landlords clearly cannot rely on the principle laid down in *Skinner* v. *Geary* (1) in the events which have happened, namely, the return of the husband to the flat and his wife before the date of the hearing, the comparatively short interval of time, and other matters. The deputy judge, on the question whether possession had been surrendered, said : " The second point taken by Mr. Share " on behalf of the defendants was that Mr. Alexander never " effectively gave up possession ; that he remained, so to " speak, a statutory tenant in possession malgré lui, by virtue " of the presence in the flat of his wife and his furniture ; and " that consequently this vicarious possession enured to his " benefit when he changed his mind and resumed occupation."

I do not propose to read the letters which my Lord has already read. It seems plain to me on them that the landlords took the line which one would have expected, and which they were certainly entitled to take, that, having procured the defendant's signature to the document declaring that he had given up possession of the flat in January, 1949, they then discovered, as the fact was, that the wife and the furniture were still there, and not only that they were still there—they may have known that before—but that the wife was unwilling to go and that therefore they could not get possession of the premises to which they were entitled on the termination of the

(1) [1931] 2 K. B. 546.

first defendant's possession whether as original contractual lessee or as statutory tenant. Mr. Lloyd has admitted that it could not be suggested that possession had been effectively surrendered up to March 11, 1949, but he submitted that the formal revocation of the licence which was signed by the husband must be regarded as amounting in law in itself to a surrender of possession. It is clear, I think, that the landlords, in the letter of March 8, were not so regarding it and did not ask the husband to sign it on the basis that that would, as it were, enable him to say, " I have surrendered possession." I think that in taking up that line they were right. The wife still remained in the house and the furniture remained in the house, and it is, in my view, unnecessary to decide in this case what would be the position—and it is a somewhat unlikely one—if a husband succeeded in clearing the house of furniture, his wife insisted on remaining in the unfurnished house, and he then gave to the landlord a revocation of the licence to his wife. That question can be determined when it arises, and it might turn on the question whether the landlord accepted that position as a proper surrender. But the furniture's being left in the house seems to me in itself sufficient to prevent the defendant in this action from being able to establish that possession was surrendered, and for these reasons I think that the appeal must be allowed. I would like also to pay a tribute to the extremely careful judgment and review of the authorities by the deputy judge.

DENNING L.J.: If a statutory tenant goes out of occupation, leaving lodgers or sub-tenants or no one in the house, he ceases to be entitled to the protection of the Rent Restriction Acts; but he does not, in my opinion, lose the protection if he goes out, leaving his wife and furniture there. The reason is because the wife, so long as she is behaving herself properly, has a very special position in the matrimonial home. She is not the sub-tenant or licensee of the husband. It is his duty to provide a roof over her head. He is not entitled to tell her to go without seeing that she has a proper place to which to go. He is not entitled to turn her out, without an order of the court: see *H.* v. *H.* (1). Even if she stays there against his will, she is lawfully there; and so long as she is lawfully there the house remains within the Rent Restriction Acts after he leaves, just as it does after

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(1) (1947) 63 T. L. R. 645.

C. A.
1949
OLD GATE ESTATES LD. v. ALEXANDER.
Denning L.J.

he is dead. She can pay the rent and perform the obligations of the tenancy on his behalf, and the landlord can only obtain possession if the conditions laid down by the Acts are satisfied. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for the defendants: *Beach & Beach.*
Solicitors for the landlords: *Stilgoes.*

C. G. M.

Reversed. [1951] A. C. 367

C. A.
1949
Oct. 27;
Lord Goddard C.J., Asquith L.J. and Vaisey J.

PARIS *v.* STEPNEY BOROUGH COUNCIL.

Master and servant—Accident to servant—Safe system of work—Risk of greater injury—Servant with only one good eye—Other eye injured—Master's obligation.

A workman was employed as a garage hand by the defendants. He had, as the defendants knew, but one good eye. When working on the back axle of a vehicle he struck a U bolt with a hammer in order to facilitate its removal. A chip of metal flew off and injured his good eye. He was not wearing goggles. He claimed damages against the defendants in respect of that injury on the ground that they were negligent in failing to provide, and require the use of, goggles as part of the system of work.

Held, that as the operation in question was not in itself a dangerous one, the defendants were not obliged to provide goggles as part of the system of work; and that the plaintiff's disability was not relevant to the stringency of the duty owed to him in that respect because that disability exposed him not to a greater risk of injury, but only to a risk of greater injury.

Decision of Lynskey J. reversed.

APPEAL from Lynskey J.

The plaintiff was employed by the defendant borough council as a garage hand at premises of theirs at Stepney where the maintenance and repair of their vehicles was carried out. On May 28, 1947, his right eye was injured while he was working there on a vehicle belonging to the defendants. He claimed damages in respect of that injury from the defendants on the ground of their negligence in failing to provide, and require the use of, goggles as part of the system of work.

The plaintiff had suffered injuries to his left eye in an air raid in 1941 when on leave from the army. On May 28, 1947, he was working on the back axle of a gully cleaner which was elevated some four or five feet on a ramp. He had to remove a "U" bolt, but found that it was rusted in. He therefore hit it with a hammer. A chip of metal flew off and entered his right eye, and as a result he lost the sight of that eye entirely and was now in effect a blind man. The plaintiff was not wearing goggles at the time of the accident. Had he asked for them, he might have been provided with them, but their provision was not part of the defendants' system of work, and the men were not invited to use them. It was known to the defendants that the plaintiff had only one useful eye.

Lynskey J., giving judgment, summed up his conclusions as follows: "I am satisfied here that there was, so far as this "particular plaintiff was concerned, a duty upon the employers "to provide goggles and require the use of goggles as part of "their system. In these circumstances it seems to me that "the employers have failed in their duty and the plaintiff "is entitled to recover." He accordingly gave judgment for the plaintiff.

The defendants appealed.

H. Edmund Davies K.C. and *A. L. Stevenson* for the defendants. The judge below held that the defendants were under a duty to provide goggles and require their use as part of their system of work, and that they were in breach of that duty. But there was no evidence to support his conclusion that the defendants were under a duty to provide goggles for the work in question. The evidence was in fact that it was extremely rare for goggles to be used for work similar to that in question. The only duty which was owed by the defendants to the plaintiff was the general duty to provide a safe system of work for their employees. The fact that the plaintiff had already injured one eye was not material.

Beney K.C. and *Marven Everett* for the plaintiff. The judge below decided only that the defendants were under a duty to provide the plaintiff, one particular employee of theirs, with goggles for the work in question, and the evidence in fact established that the work was dangerous and particularly dangerous to the plaintiff. The defendants' duty to other of their employees was not in issue. The duty of an employer to an employee is based on the particular contract of service between the employer and that employee: see

C. A.

1949

PARIS
v.
STEPNEY
BOROUGH
COUNCIL.

Smith v. *Charles Baker & Sons*, per Lord Herschell (1); *Wilson & Clyde Coal Co., Ld.* v. *English* (2). It follows that the duty is a personal one owed by the employer to that particular employee. The employer is under a duty to provide a safe system of work for each individual workman. Whether failure to provide goggles for a particular workman is a breach of that duty depends, not on the likelihood of an accident happening to that workman, but on the likelihood of that particular man's suffering serious damage. The damage resulting to the plaintiff from an eye-injury would necessarily be far more serious than the damage resulting from such injury to a workman of the defendants with two good eyes. It follows that the defendants were under a special duty to provide that particular man with goggles.

LORD GODDARD C.J. It was argued for the plaintiff before Lynskey J. that there was a breach of duty on the part of the defendants because they did not supply goggles. It was said that it was well known that specks of metal would fly off bolts such as the U bolt in question, when struck, and, therefore, that workmen ought to be supplied with goggles when they were doing that class of work. But the evidence fell far short of showing that in the ordinary way there was any duty on an employer to supply goggles for such work. There is no finding by the judge that the operation was a dangerous one, and on the evidence it seems to me to be abundantly clear that he could not have so found. Knocking at a metal bolt is an operation which any chauffeur attending to his master's car might be called on at any moment to do. Of course, if a hammer is used in knocking a piece of hard metal it is always possible that a speck, or chip, of metal will fly off; but to say that the operation was therefore a dangerous one would, I think, be extravagant. An operation is not to be classed as dangerous because very occasionally, in the course of years, an accident may happen. Accidents always happen, but that does not make the operation in question a dangerous one.

The ground on which the judge has decided the present case, and on which Mr. Beney has endeavoured to uphold the judgment, is that because the plaintiff had only one eye the defendants owed to him a greater duty than they owed to other employees, since the consequences of an accident would be so much more serious. I think that the effect of the judge's judgment was that he was deciding that there was a duty on the defendants to provide a particular protection for this particular man. But, with great respect to him, I think that he was confusing the duty, or the obligation, of the defendants with the damage which might result to this particular plaintiff. Before there is an obligation on the defendants to provide goggles, or any particular protection, for the plaintiff, it has to be shown that he was engaged in a dangerous operation. He was not engaged in a dangerous operation. If two men had been employed on the operation, one with two good eyes and one with only one good eye, the risk to each would have been exactly the same, and, as there was no particular risk or danger in the operation, neither man would have been exposed to an unusual danger. The duty of an employer is not to expose his workmen to unusual danger, and to supply them with proper plant for the carrying out of their duties. As, therefore, there was no unusual danger, and as the plaintiff was working ordinarily in the ordinary course of his employment, for which goggles were not required, there was no obligation on the defendants to provide them.

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(1) [1891] A. C. 325; 362.

(2) [1938] A. C. 57.

The fact that if an accident did happen to this particular man the consequences to him might be more serious than to someone else, that is, that the damage which he would suffer might be greater, does not seem to me to be the correct test in the present case. There was no unusual danger to which the plaintiff was exposed. He was not exposed to any greater danger than any other man who was employed in the garage. The operation in question was not in itself a dangerous one; goggles were not a thing which it was the duty of the defendants to provide for carrying it out; and I cannot see, therefore, that there was a duty on them to provide goggles merely because, if an accident did happen, the consequences to the plaintiff would be more serious than to another.

For these reasons I regret that I cannot agree with the judgment of the judge below, and, in my opinion, the appeal should be allowed.

ASQUITH L.J. I am of the same opinion. It is not entirely clear whether the judge held that the duty to provide and enforce the use of goggles applied to all workmen doing this particular job, and a fortiori to a man with the particular

C. A.

1949

Paris
v.
Stepney
Borough
Council.

Asquith L.J.

disability from which the plaintiff suffered, or whether he was saying that it was a duty owing only to this particular employee. On the whole I am satisfied that he meant that the duty was owed only to the plaintiff, and, if he did, I respectfully agree with the views stated by the Lord Chief Justice. The plaintiff's disability could only be relevant to the stringency of the duty owed to him if it increased the risk to which he was exposed. A one-eyed man is no more likely to get a splinter or a chip in his eye than is a two-eyed man. The risk is no greater although the damage may be greater to a man with only one good eye than to a man with two good eyes. But the quantum of damage is one thing and the scope of the duty is another. A greater risk of injury is not the same thing as a risk of greater injury; the first alone is relevant to liability.

For these reasons I agree with my Lord that the appeal should be allowed.

Vaisey J. With great respect to Lynskey J., it seems to me that his judgment involves a certain confusion of thought. For myself I cannot see how the fact that the plaintiff had only one eye can really have been material to the point which he had to decide. The consequence of an accident to the plaintiff would certainly be liable to be specially serious, but the risk of danger here was precisely the same to him as it would have been to a workman with two eyes. The judge did not find that the risk of danger was of such a character that it was the general duty of the defendants to take precautions against it; and I cannot for myself see that they were under any particular duty in the case of a particular employee merely because the personal consequences to that employee would be more serious than they would have been to some of his fellow-employees. I agree that the appeal should be allowed.

Appeal allowed.

Solicitor for defendants: *W. H. Thompson.*
Solicitor for plaintiff: *Thomas V. Edwards.*

R. P. C.

WOOZLEY *v.* WOODALL SMITH.

C. A.

1949
Nov. 2, 3;
Dec. 2.

Evershed M.R., Cohen and Asquith L.JJ.

Landlord and tenant—Standard rent—Dwelling-house let at progressive rent—Rent payable on September 1, 1939, *less than two thirds of rateable value—Maximum rent in excess of rateable value—Whether Rent Restriction Acts apply—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1 (*a*) *and* 7*—Rent and Mortgage Interest (Restrictions) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *sch. I.*

By a lease dated December 14, 1937, a dwelling-house was let, as it was assumed, for the first time, and it was then let to a tenant for the term of 29 years from September 29, 1936, at the rent of 5*l.* until September 29, 1944, and thereafter at the rent of 65*l.* a year. In 1947 the defendant as a successor in title of the tenant sub-let the house to the plaintiff at the yearly rent of 225*l.* from November 14, 1947, to September 29, 1965. The rateable value of the premises was 38*l.* In May, 1949, the plaintiff brought proceedings against the defendant, claiming that the standard rent was 65*l.* a year. It was conceded that the premises could only be brought within the Rent Restriction Acts by the Rent and Mortgage Interest Restrictions Act, 1945. The question arose whether, as a rent of 5*l.* only was payable on September 1, 1939, the Rent Restriction Acts were made inapplicable by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 7, or whether the rent payable must be regarded as 65*l.* under the proviso to s. 12, sub-s. 1 (*a*), of the Act.

Held, (1.) that, when the substantive part of s. 12, sub-s. 1 (*a*), as amended by sch. I. to the Act of 1939 was considered, the proviso to that sub-section must be treated as expanded so as to read: "Provided that in the case of any dwelling-house let at "a progressive rent . . . . the rent at which it was let on "September 1, 1939, shall be taken to be the maximum rent "payable under such tenancy and the latter shall be the standard "rent"; and that on this footing s. 12, sub-s. 7, which provided that "where the rent payable in respect of the tenancy of any "dwelling-house is less than two-thirds of the rateable value "thereof this Act shall not apply to that rent or tenancy", had no application because the rent payable on September 1, 1939, would then be regarded as 65*l.*; and (2.) that if the word "where" in s. 12, sub-s. 7, were given the meaning "if and so "long as" as suggested by Lord Uthwatt in *J. & F. Stone Lighting and Radio Ld.* v. *Levitt* [1947] A. C. 209, 218, the same result would follow because in that case the excluding effect of s. 12, sub-s. 7, would not extend beyond the date in 1944 when the progressive rent rose to 65*l.*

APPEAL from West London county court.

By a lease dated December 14, 1937, the Earl of Cadogan demised to Miss Constance J. Boyes the dwelling-house, 41, Hasker Street, Chelsea, for the term of 29 years from September 29, 1936, at the yearly rent of 5*l.* until September 29, 1944, and thereafter of 65*l.* The defendant, Mrs. Marjory J. Woodall Smith, was the successor in title of Constance J. Boyes, and by an underlease dated November 14, 1947, as landlord, in consideration of a premium of 250*l.* demised the premises to the plaintiff, Miss P. E. Woozley, at the yearly rent of 225*l.* from November 14, 1947, to September 29, 1965. The rateable value of the premises was 38*l.*

In May, 1949, the tenant brought proceedings against the landlord for a declaration that the standard rent of the premises for the purposes of the Rent Restriction Acts was 65*l.*, and for payment of 218*l.* 9*s.*, being the rent overpaid on this footing down to March 25, 1949. By her defence dated May 28, 1949, the landlord denied that the standard rent was 65*l.*, and contended that that rent was 225*l.*, being the rent payable under the underlease which, the landlord contended, was the first letting for the purpose of ascertaining the standard rent.

The county court judge said that the question turned on the effect of s. 12, sub-s. 7, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, (1) which provided that when the rent payable in respect of a tenancy was less than two-thirds of the rateable value, the Act did not apply to that rent or tenancy. The Rent and Mortgage Interest Restrictions Act, 1939, was the material Act, and the question therefore was whether on September 1, 1939, the dwelling-house in question was let for a rent of less than two-thirds of the rateable value. The rent then payable was 5*l.* a year and the rateable value 38*l.* a year. It was true that the rent was to be raised to 65*l.* in 1944, and that by the terms of s. 12, sub-s. 1 (*a*) (1) of the Act of 1920 it was provided that where a dwelling-house is

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, in a proviso to sub-s. 1 (*a*), provides: "in the "case of any dwelling-house let "at a progressive rent payable "under a tenancy agreement or "lease, the maximum rent "payable under such tenancy "agreement or lease shall be the "standard rent."

Sub-section 7: "Where the "rent payable in respect of any "tenancy of any dwelling-house "is less than two-thirds of the "rateable value thereof, this Act "shall not apply to that rent or "tenancy . . . . and this Act "shall apply in respect of such "dwelling-house as if no such "tenancy existed or ever had "existed."

let at a progressive rent the maximum rent was to be the standard rent. But it had first to be established that the Rent Restriction Acts applied to the property. In his view, as the rent on September 1, 1939, was 5*l.*, s. 12, sub-s. 7, of the Act of 1920 prevented the Acts from applying so that the tenancy must be regarded as non-existent. It followed, therefore, that it was the first letting after the Act of 1939 came into force that must be looked to, and the standard rent was 225*l.* The tenant appealed.

Beney K.C. and *G. H. Crispin* for the tenant. In interpreting s. 12, sub-s. 7 of the Act of 1920, much depends on what is meant by "where." One of the possible meanings is "during such time as."

[EVERSHED M.R.: A very usual meaning is "in cases in "which."]

In *J. & F. Stone Lighting & Radio Ld.* v. *Levitt* (1), Lord Uthwatt gives the word in this sub-section the meaning "if and so long as." If that be correct the rent of 5*l.* is immaterial for, at the time, when these proceedings were brought, the rent had been increased to 65*l.* and the sub-section will not apply. That accords with s. 12, sub-s. 1 (*a*), which provides that the maximum rent of premises let at a progressive rent is to be the standard rent. It is true that, under the Rent Restriction Act of 1939, regard must be had to the rent on September 1, 1939, when the rent was only 5*l.*, but the answer to that is that when there is a progressive rent it is the maximum rent that fixes the standard rent. Further, under the Act of 1939, it is the amount of the rateable value (if less than 100*l.* in London) that makes the Rent Restriction Acts apply. Furthermore, the status of a house has to be ascertained at the time of the application to the court: compare *Prout* v. *Hunter* (2) and *Leslie & Co. Ld.* v. *Cumming* (3), cases where the question was whether a house had the status of a furnished house. That applies by analogy in the present case. The county court judge was in error in taking into account only the rent payable on September 1, 1939. That disagrees with the view of Lord Uthwatt that it is the date when proceedings are brought to which regard must be given.

[EVERSHED M.R.: Suppose that there were a lease and a sub-lease, but that on September 1, 1939, the sub-lease were invalid as having been granted without the leave of the landlord and that then some years later the landlord waived the forfeiture : would you say that the rent then must be taken into account ?]

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(1) [1947] A. C. 209, 218.
(2) [1924] 2 K. B. 736, 741.
(3) [1926] 2 K. B. 417.

Yes, seeing that there was no valid sub-lease in 1939.

Stranders for the landlord. The statement by Lord Uthwatt in *J. & F. Stone Lighting & Radio Ld* v. *Levitt* (1) had nothing to do with standard rent and has no bearing here. The proper date for fixing the standard rent is the date of letting, and at that date the rent under the lease was insufficient to make the Rent Restriction Acts apply. The standard rent can only be fixed by reference to the sub-lease. If on September 1, 1949, the rent payable had been 65*l.* the landlord might well have been in a difficulty and I should not have been here to argue the question. There is no ground for construing "where" in s. 12, sub-s. 7, as meaning "so long as": that expression was used in the Act where it was intended. Different considerations might apply in such a case as this where the claim was for possession and not to have the standard rent ascertained. *Veale* v. *Cabezas* (2) supports the landlord's contention even though the particular point of a progressive rent did not there arise. To have regard in the present case to the subsequent increased rent involves disregarding s. 12, sub-s. 7. Where premises were let for business purposes and afterwards, by consent, they were taken into use as a dwelling-house only, that would amount to a new letting. Such a letting is excluded from the Rent Restriction Acts only while the letting is for insurance purposes only. So, too, as regards a letting furnished. Such cases have no bearing on the present one. The date of the hearing can have no bearing on s. 12, sub-s. 7. Having regard to that sub-section, the rent of 5*l.* was not a proper one for the purposes of the Rent Restriction Acts, and therefore there cannot be said to have been a progressive rent within s. 12, sub-s. 1 (*a*). Even if the rent in the present case is a progressive rent within s. 12, sub-s. 1, the rent on September 1, 1939, is what is material, and, as that was only 5*l.* at that date, s. 12, sub-s. 7 applies.

Beney K.C. replied.

Cur. adv. vult.

Dec. 2. EVERSHED M.R.: I will ask Cohen L.J. to read the judgment of the court which has been prepared by Asquith L.J.

(1) [1947] A. C. 209.

(2) [1921] W. N. 311.

COHEN L.J.: This appeal is from an order of Judge Sir Gerald Hargreaves made upon the application of the plaintiff, as tenant of certain premises known as No. 41 Hasker Street, Chelsea, for determination of the standard rent of those premises under s. 11 of the Rent and Mortgage Interest Restrictions Act, 1923. The defendant is the plaintiff tenant's landlord, being herself entitled as hereafter appears to the benefit of a lease of the premises from the freeholder Earl Cadogan. It is conceded that the premises were brought within the purview of the Rent Restriction Acts by virtue of the Act of 1939. The standard rent has therefore to be determined in accordance with the terms of s. 12, sub-s. 1 (*a*), of the Act of 1920 as amended. The sub-section is as follows: " The expression ' standard rent ' means the rent at which the " dwelling-house was let on September 1, 1939 or, where the " dwelling-house was not let on that date, the rent at which " it was let before that date, or, in the case of a dwelling-" house which was first let after September 1, the rent at which " it was first let. Provided that, in the case of any dwelling-" house let at a progressive rent payable under a tenancy " agreement or lease, the maximum rent payable under such " tenancy agreement or lease shall be the standard rent, and, " where at the date by reference to which the standard rent is " calculated, the rent was less than the rateable value the " rateable value at that date shall be the standard rent."

The relevant facts are not in dispute. The premises were the subject of a lease granted on September 30, 1845, by the then Earl Cadogan to one George Todd for the term of 99 years from September 29, 1845. The term of this lease expired, therefore, on September 29, 1944. It is, however, a curious feature of the case that the rent payable under the lease of 1845 is unknown. Nor is it apparently known who, at the date of the grant of the lease already mentioned (under which the respondent derives her title), namely, September 14, 1937, was entitled to the unexpired residue of George Todd's term of 99 years, or who was then in fact in occupation of the premises. In the result it has been agreed by the parties to the present litigation both in the county court and in this court that the lease of 1845 must be regarded as irrelevant, and that the premises must be treated as having been for the first time let as a dwelling-house by the lease of 1937. By this lease the present freeholder granted to a Mrs. Boyes a lease of 29 years from September 29, 1936. The rent payable under this lease was for the period from September 29, 1936, to September 29, 1944, that is, for the then unexpired residue of George Todd's term (if still subsisting) 5*l*. a year, and thereafter for the remainder of the 29 years 65*l*. a year. It is conceded that 5*l*. a year is and was at all material times less than two-thirds of the rateable value of the premises.

At some time before November 14, 1947, the defendant landlord acquired the interest of Mrs. Boyes under the lease of 1937, and on November 14, 1947, she, the landlord, proceeded to grant to the plaintiff tenant an underlease of the premises for the term of the 1937 lease less three days at a rent of 225*l*. a year. On these facts the question is whether the standard rent is 65*l*. a year or (as the county court judge held) 225*l*. a year. No doubt s. 12, sub-s. 1 (*a*), which deals with the ascertainment of the standard rent, and s. 12, sub-s. 7 (which excludes certain tenancies from the operation of the Act, and, therefore, inter alia, from that of s. 12, sub-s. 1 (*a*),) must, for the present purpose, that of ascertaining the standard rent, be " read together." This does not involve the (physically impossible) task of reading them simultaneously : it merely involves construing each with due regard to the existence and terms of the other. We will consider the two provisions in the order in which they appear in the Act, though we think it makes no difference in which order they are read : and, first, we will consider s. 12, sub-s. 1 (*a*) in abstraction from s. 12, sub-s. 7, introducing later the complications raised by that sub-section. In the first two or three lines the words " was let on September 1, 1939 " clearly mean " was the " subject-matter of a letting current on September 1, 1939," not " was let under a contract made on that date." We do not think this is challenged. In any case it seems to be plain beyond argument. If so, the first question is : were these premises the subject-matter of a letting in force on September 1, 1939 ? On the face of this sub-section, read in vacuo, the answer must be " Yes." The second question, on the same basis, is : at what rent were they so let ? This means not what rent was de facto being paid or could be exacted in the latter part of 1939, but what rent was provided for under the contract of letting current on September 1 of that year. The answer is therefore not " at a rent of 5*l*. a year," but " at " a progressive rent, rising from 5*l* a year in the period up to " Michaelmas, 1944, to 65*l*. thereafter till 1965." No other

C. A.

1949

WOOZLEY
v.
WOODALL
SMITH.

answer would be true. If so, still confining ourselves within the frontiers of s. 12, sub-s. 1 (*a*), and giving effect to the proviso, we must conclude that the standard rent is 65*l.* and that the tenant wins.

But it is objected on behalf of the landlord that you must now re-read s. 12, sub-s. 1 (*a*), in the light of s. 12, sub-s. 7. Section 12, sub-s. 7 reads as follows: "Where the rent payable in respect of any tenancy of any dwelling-house is "less than two-thirds of the rateable value thereof, this Act "shall not apply to that rent or tenancy nor to any mortgage "by the landlord from whom the tenancy is held of his interest "in the dwelling-house, and this Act shall apply in respect "of such dwelling-house as if no such tenancy existed or had "ever existed." The argument of counsel for the landlord based on this sub-section is that at the material time, which he says is September 1, 1939, the rent "payable in respect "of the" (material) "tenancy" was 5*l* a year; that this was less than two-thirds of the rateable value; that this tenancy must accordingly, by reason of s. 12, sub-s. 7, be treated as non-existent and as never having existed; that, if so, s. 12, sub-s. 1 (*a*), cannot begin to operate upon it; and, finally, that s. 12, sub-s. 1 (*a*), (in the agreed absence of any evidence as to the rent payable under any tenancy created next before September 1, 1939) designates as the tenancy determinative of the standard rent the tenancy created next after September 1, 1939, viz. the sub-tenancy held by the plaintiff at 225*l.* a year.

In considering this argument and the effect of s. 12, sub-s. 7, generally, certain terms occurring in the first two lines of the sub-section which are capable of more than one meaning call for elucidation: (1.) The opening word "where"—does this mean "in cases in which" (a meaning which, as the Master of the Rolls pointed out during the argument, it is capable of bearing); or does it mean "if and so long as," as suggested in a dictum of Lord Uthwatt in *J. & F. Stone Lighting & Radio Ld.* v. *Levitt* (1); or has it perhaps yet some other meaning? That is the first problem of construction. (2.) The expression "payable in respect of the tenancy"—does this mean, in the circumstances of the present case, so payable at the time when proceedings are taken, or payable at the time prescribed as relevant by s. 12, sub-s. 1 (*a*)? And what does "payable in respect of the tenancy" mean in the particular

(1) [1947] A. C. 209.

C. A.

1949

Woozley v. Woodall Smith.

case of a tenancy at a "progressive rent"? For in such a tenancy two or more rents are payable in successive periods in respect of the same tenancy, and the question is: which is relevant for the purposes of s. 12, sub-s. 7?

We will deal with these points in inverse order: (2.) the rent "payable in respect of the tenancy" in the case of a tenancy at a progressive rent cannot mean simply the rent payable at its inception. In such a case as the present, if the question were posed: what was the rent payable in respect of the tenancy which was in force on September 1, 1939? the answer "5*l.* a year" would, as indicated above, be misleading and indeed untrue. The consequences of this will be considered later. The question here is: payable when? More than one answer is possible. (i.) If it means "payable at the "time when application is made to the court," the issue is simplified, for at that time the rent, whether it be treated as 65*l.* or 225*l.* a year, unquestionably exceeded two-thirds of the rateable value; the tenancy is not excluded by s. 12, sub-s. 7, from the scope of the Act; s. 12, sub-s. 1 (*a*), applies to it, and the effect of its application, having regard to the proviso about progressive rents, is that the standard rent is 65*l.* (ii.) As against this (and I will assume without deciding that the first basis is wrong) it has been argued that "payable," whatever it may mean for other purposes, for example, for those of an application for possession, means, in a case brought to ascertain the standard rent, payable at the time or times laid down in the provisions of s. 12, sub-s. 1 (*a*), which deal with that subject-matter, namely, prima facie, September 1, 1939; that on that date the rent exigible was 5*l.* a year; and that, as 5*l.* a year is less than two-thirds of 38*l.* a year (the then rateable value), the material tenancy, that of 1937, is excluded by s. 12, sub-s. 7, from the operation of s. 12, sub-s. 1 (*a*), of the Act; and that the first tenancy which attracted its operation was the sub-tenancy of 225*l.*

The answer to this contention has been anticipated when we were dealing with s. 12, sub-s. 1 (*a*). The word "payable" is followed by the words "in respect of any "tenancy." This means, in the case of a tenancy current on September 1, 1939, not the rent payable in the latter part of 1939, but the rent payable under the provisions of the tenancy in force on September 1, 1939, which provisions provide for a progressive rent rising from 5*l.* to 65*l.* Again we are confronted with the question: which of these figures is relevant for the purposes of applying s. 12, sub-s. 7? It must be possible to say whether s. 12, sub-s. 7, excludes a particular tenancy from the Act or not. Yet here are two (successive) rents both "payable in respect of the tenancy," and there is nothing within the four corners of s. 12, sub-s. 7, to show which is relevant. If the 5*l*. rent is relevant, the tenancy is excluded. If the later 65*l*. rent is relevant, it is not excluded. The answer must be sought and can be arrived at by reading this subsection together with s. 12, sub-s. 1 (*a*), and its proviso. The proviso to s. 12, sub-s. 1 (*a*), which we have already read begins: "Provided that in the case of any dwelling-house let at a progressive rent . . . . the maximum rent payable under such tenancy"—we pause there. If the sentence had continued "shall be deemed to be the rent at which the house was let on September 1, 1939," the case would have been completely plain; 65*l*. would have been, or been deemed to be, the standard rent. The proviso in fact does not continue in that way. It proceeds "shall be the standard rent," words which assume that s. 12, sub-s. 7, had not excluded the tenancy in question from the ambit of the Acts and the operation of s. 12, sub-s. 1 (*a*) (because if it had no question of a standard rent could arise). That is the crux to which the case, in this aspect of it, narrows down.

Reading the two sub-sections "together," and reading the proviso to s. 12, sub-s, 1 (*a*), together with the substantive provisions of that sub-paragraph, we feel little doubt as to the result. So read, the proviso (which is condensed) can, in our view, legitimately be construed as though it were expanded by the insertion of certain words drawn from the substantive part of s. 12, sub-s. 1 (*a*). So expanded it would read as follows: "Provided that, in the case of any dwelling-house let at a progressive rent . . . . the rent at which it was let on September 1, 1939, shall be taken to be the maximum rent payable under such tenancy and the latter shall be the standard rent." This does not involve rewriting the provision in any pejorative sense of "rewriting"; it merely involves making its implications explicit. We say this because—(*a*) by the substantive provision of s. 12, sub-s. 1 (*a*), the rent at which the dwelling-house was let on September 1, 1939, equals the standard rent; (*b*) by the proviso (in the case of a lease at a progressive rent—this case) the maximum rent under that lease equals the standard rent; hence (*c*) (since things which are equal to the same thing are equal to each other), the rent at which the dwelling-house was let on September 1, 1939, is to be taken to be equal to the maximum rent payable under the lease, which equals 65*l*., and so excludes the annihilating application of s. 12, sub-s. 7.

(1.) We have still to deal with the meaning of the word "where" at the beginning of s. 12, sub-s. 7. If it means "in cases in which" the conclusions reached above stand. But the same conclusion (namely, that the standard rent is 65*l*.) can be reached if "where" means, as Lord Uthwatt (obiter) in the *Stone Radio* case (1) took it to mean, "if and "so long as," a construction to which we incline. For, assuming that the foregoing arguments are fallacious, assuming against the tenant that on September 1, 1939, the rent payable in respect of the tenancy is 5*l*. a year, and that consequently s. 12, sub-s. 7, kills the lease of 1937 and that so long as the rent remains 5*l*. a year its lethal effect continues, yet, if "where" means "if and so long as," that lethal effect does not continue beyond Michaelmas, 1944, when the rent rises to 65*l*. The tenancy then comes to life again; s. 12, sub-s. 1 (*a*) has to be applied to it; and the result of its application is that, there having been on September 1, 1939, no lease which the law would recognize, and no intelligible evidence as to any letting next before September 1, 1939, the first lease recognized by the law as existing after September 1, 1939, is that which springs into life in September, 1944, and that was a lease at 65*l*., which is accordingly on this basis, too, the standard rent. In other words, we construe the subsection as meaning that, whenever it is in fact found that as an incident of the relationship of landlord and tenant as regards any premises the rent payable by the tenant is below the level indicated, then, for all the purposes of the Acts that rent and relationship are to be excluded from consideration, that is, the premises are not to be treated as being "let as a dwelling." But we see no necessity for treating the exclusion as operative for any longer time than the period during which the conditions demanding it in fact exist.

All roads, therefore, seem to lead to 65*l*. We think the appeal should be allowed, and a refund ordered of all sums paid in excess of 65*l*. a year.

Appeal allowed.

Solicitors: *Raymond Pollard & Co.*; *Stoneham & Sons.*

H. C. G.

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(1) [1947] A. C. 209.

SCHOOLEY *v.* NYE.

C. A.

1949
Nov. 14, 15.

Bucknill, Somervell and Denning L.JJ.

Landlord and tenant—Trade or business premises—Claim for new lease—Report made by referee—Requirements that report shall be in writing and filed in court office—Oral discussion on report (before judgment and in absence of parties) by county court judge with referee—Irregularity—Judgment set aside—County Court Rules, 1936, *Or.* 19, *r.* 2 (*g*), *Or.* 40 (*Landlord and Tenant Act,* 1927) *r.* 5—*Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 4, 5 *and* 21—*County Courts Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 90.

On an application in the county court for a new lease made under s. 5 of the Landlord and Tenant Act, 1927, the proceedings stood referred, for inquiry and report, to a referee under s. 21, sub-s. 2, of that Act. The referee duly reported in writing pursuant to the County Court Rules, 1936, Or. 19, r. 2 (1) g, and Or. 40, r. 5, and the report was filed. The county court judge then saw the referee and orally discussed with him an issue in the case, in the absence of the parties. The referee made no written report of this conversation. On the case coming before the judge, at the outset, he intimated to the parties that he had seen the referee and discussed this issue with him. Objection was raised by counsel for the applicant, the tenant, to this interview having taken place, and, after some debate on the question whether the case should be referred back to this referee or sent to another, both counsel agreed that the case should proceed. The judge dismissed the application.

Held, that the fact that counsel for the applicant had assented to the case proceeding did not preclude him from taking the point before the Court of Appeal that the oral discussion between the judge and referee on an issue in the case, in the absence of the parties, vitiated the proceedings and entitled the applicant to have the judgment set aside.

Held also, that, though the county court judge was actuated by the best motives in taking the course he did, finding difficulty in the case and thinking that he might save the parties costs and so assist the course of justice, the oral discussion between the judge and the referee in the absence of the parties, not being sanctioned by the procedure laid down in the County Court Rules, 1936, was an irregularity which vitiated the proceedings. It had been contended that the only effect of the discussion would have been on the mind of the referee; but it might be that the attitude, which the referee adopted, might have influenced the judge in coming to his conclusion, though the Court of Appeal did not find as a fact that he was so influenced.

Per Bucknill L.J.: The judge's action was in excess of jurisdiction.

Per Somervell L.J.: It was unnecessary to decide any case other than the present; but it was most undesirable that methods of communication between the court and the referee should be employed other than those laid down by the County Court Rules, 1936.

Per Denning L.J.: In effect, by reason of the action of the judge, the referee made an oral report, when he was directed to make one in writing. The parties were precluded from applying to vary the terms of this report, since its terms were not in writing

APPEAL from Brighton and Lewes county court.

The applicant was the lessee of a garage for some 20 years, expiring on December 31, 1949. The garage was situated at the back of the Grand Hotel, Brighton, and close to the Hotel Metropole in that town. The applicant applied for a new lease in Brighton county court on April 30, 1947, under s. 5 of the Landlord and Tenant Act, 1927, and the matter was referred to a referee, who reported in writing on June 8, 1949, that the trade derived from visitors to the two hotels constituted much the largest element in any goodwill belonging to the business; and that, since this was due to the situation of the premises, it must be ignored in considering whether there was any adherent goodwill. He wrote: "I have "come to the conclusion, though not without considerable "hesitation, that I ought to accept the view (though not the "figures) of the applicant's first expert witness who has had "a wide experience of the motor trade and to report that having "regard to the length of time during which the applicant "and his predecessors in title had carried on business on the "premises, to the evidence of custom apart from that derived "from the hotels, and to all the circumstances, but disregarding "any value attributable to situation, the value of the premises "has been enhanced to some extent, as the direct result of the "carrying on, on the premises, of the trade of a garage proprietor and motor engineer, by the applicant." Accordingly, the referee wrote that he would be entitled to some compensation under s. 4 of the Act, an amount which would be quite small, and such as would not compensate the applicant for the loss which he would sustain by removal. The applicant therefore would be entitled to a new lease.

The judge, with the consent of the parties, asked for a supplementary report. A further report in writing was obtained from the referee, entitled: "Particulars of goodwill." This set out the estimated annual takings, the proportion of cash takings not derived from hotel visitors, the annual profit, the proportion of annual profit not derived from hotel visitors—this was an estimate on the part of the referee—the proportion of adherent profit, and the rental value of adherent profit, say 50*l*. Then, there was a note: "The estimate of adherent "profit must, as was pointed out by Maugham L.J. in *Whiteman* "*Smith Motor Co. Ld.* v. *Chaplin* (1) be largely a matter of "guesswork." A notice was given by the applicant to adopt the report and a counter notice by the landlord to vary the report: see C. C. R., Or. 19, r. 2 (1) (h). No evidence was called before the county court judge except that certain accounts were put in. Apart from those accounts, there was nothing before the county court judge except the reports of the referee.

In giving judgment the county court judge said: "To my mind very considerable difficulty remains. The "referee has kindly seen me: and in answer to the question, "would any proposing lessee be likely to be affected as regards "the rent that he should pay by the alleged existence of "adherent good will vested in the tenant? it seemed that "he thought not, and that he had felt great doubt and difficulty "in making his report." In another passage he said: "He" (the referee) "kindly gave me the opportunity of seeing him "and I asked him whether he thought the suggested goodwill "could affect the bargain which a new lessee would make, "but I got no answer which assists me."

Objection was taken by counsel for the applicant to the fact that the judge had conversed orally with the referee on the issue in the absence of the parties. Two courses were suggested: (1.) That the report should be sent back to the referee; (2.) that the matter should be sent for report to another referee; but both parties agreed that the case should proceed. In the event, the judge decided that there was no adherent goodwill, and he dismissed the application. The applicant appealed

Paull K.C. and *Gwyn Rees* for the applicant. The judge here, before giving judgment, had had a private conversation with the referee on the issues between the parties. The parties were not present at this conversation and were not informed that it would take place. This conversation vitiated the proceedings and renders the judgment a nullity. In fact, objection was taken by counsel for the applicant as soon as the judge stated that he had had this conversation, though it is not necessary to this appeal that he should have

(1) [1934] 2 K. B. 35, 51.

done so, since the matter goes to jurisdiction. In the language of s. 21, sub-s. 2 of the Landlord and Tenant Act, 1927, the matter stood "referred for inquiry and report" to the referee, not for inquiry and oral discussion between the judge and the referee. By s. 21, sub-s. 2 of the Act of 1927 the matter stands referred to the referee "as if with the consent of the "parties, the matter had been referred to him in pursuance "of s. 6 of the County Courts Act, 1919," now s. 90 of the County Courts Act, 1936. The report must be in writing and filed in the court office: see C. C. R., 1936, Or. 19, r. 2 (1) (*g*), and Or. 40, r. 5. One cannot file a conversation. The referee, in effect, must be considered as an unseen witness. At such a conversation the parties do not know what questions are put or answers made, and, since this conversation took place in their absence, they can take no objection to either question or answer. Had counsel been present, it might well be that the result of the case would be different. No doubt, an appellate court may consult the judge who tried a case, and by s. 8 of the Criminal Appeal Act, 1907, the trial judge shall furnish to the Registrar of the Court of Criminal Appeal in accordance with rules of court a report giving his opinion upon the case or upon any point arising in the case. Apart from these cases and those where proceedings are held in chambers or in camera, legal proceedings must be coram populo. It is of the first importance that justice should manifestly be seen to be done and there should be no opportunity for judges' minds to be swayed by private conversations. In workmen's compensation cases a medical referee may be summoned by the arbitrator to sit with him as assessor. see para. 5 of sch. 1 to the Workmen's Compensation Act, 1925. The assessor must assist him in open court. See, as to the duties of a medical referee where the workman is under a duty to submit himself for examination, the judgment of Viscount Simon L.C. in *Richardson* v. *Redpath, Brown & Co. Ld.* (1). The report of the medical referee will be in writing and will be available to the parties as part of the materials on which the final arguments and the ultimate decision will be based. But a referee under the Landlord and Tenant Act, 1927, is not an assessor; the referee's report in writing must show the evidence given before him, the facts which he found, the inferences which he drew from them, and the result at which he arrived, having applied his view

(1) [1944] A. C. 62, 69.

of the law: see the judgment of du Parcq J., in *Freeman* v. *Dartford Brewery Co. Ld.* (1). In *Owen* v. *Nicholl* (2) where the issue was whether the defendant was in partnership with his son, the case by consent was referred to arbitration by the registrar. Application having been made to the judge to set aside the award of the registrar, he consulted the registrar as to what had occurred. Tucker L.J. said that, in a case of that kind, if it had become necessary for the judge to consult the registrar as to what had occurred, it was desirable that before the judge gave his decision he should inform the parties of what he had ascertained from the registrar, so as to enable the parties, if necessary, to comment on it, or, in an extreme case, to tender evidence contrary to what the judge had been informed or to ask the registrar to make a statement in the presence of the parties as to what had taken place.

It would seem that in the case now before the court the judge did not agree with the report and the supplementary report of the referee. He thought that if, by consulting with the referee, he could persuade the referee to his own way of thinking that would support him in a finding for the landlord. It is submitted that this practice of oral consultation between the judge and the referee in the absence of the parties is most dangerous and should be held to vitiate the proceedings.

Salmon K.C. and *W. K. Carter* for the landlord. If the judge wants to know whether the referee has directed his attention to a point, there seems to be no reason why he should not do so, and he must have inherent power to do so. No doubt, it would have been better if any question which the judge wished to ask the referee had been put into writing and the answer to it written. It is difficult to see how any miscarriage of justice can be said to have arisen, because the judge asked the referee: "Would any proposing lessee "be likely to be affected as regards the rent that he should "pay by the alleged existence of adherent goodwill vested "in the tenant?" The suggestion is that, in reply, the referee gave a qualified assent to his, the judge's, view. If any mind was affected, it was that of the referee and not that of the judge, and the decision of the case rested with the judge. There is no reason to think that any other matter was discussed by the judge and the referee.

Assuming that this conversation between the judge and the referee was an irregularity, the objection was not in terms

(1) [1938] 3 All E. R. 120, 122.

(2) [1948] 1 All E. R. 707.

C. A.

1949

SCHOOLEY v. NYE.

taken; and, if it be held to have been taken, the applicant's counsel, when offered alternatives, elected that the case should proceed. That being so, counsel for the applicant is precluded from now taking the objection. Again on the same assumption, the position is the same as if the judge had admitted irrelevant evidence. It must be admitted that, on the evidence, the finding of the county court judge was a possible one, and there is no reason to think that it was in any way influenced by his conversation with the referee.

Paull K.C. was not called on to reply.

BUCKNILL L.J. I will ask Somervell L.J. to deliver the first judgment.

SOMERVELL L.J. This is an appeal from a decision of the judge of Brighton county court in proceedings under the Landlord and Tenant Act, 1927. The applicant was the lessee of a garage, and the lease was coming to an end. The Landlord and Tenant Act, 1927, provides, as is well known, under s. 4 for a tenant at the end of his lease being able to claim compensation for goodwill. It provides by s.5, sub-s. (1): "Where the tenant alleges that, though he would be "entitled to compensation under the last foregoing section, "the sum which could be awarded to him under that section "would not compensate him for the loss of goodwill he will "suffer if he removes to and carries on his trade or business "in other premises, he may in lieu of claiming such com-"pensation, at any time within the period allowed for making "a claim under the said section, serve on the landlord notice "requiring a new lease of the premises at which the trade "or business is carried on to be granted to him." Then there is provision that the tribunal have to consider whether the grant of a new tenancy is in all respects reasonable, and they are given power to order the granting of a new tenancy to the lessee. Section 21 concerns procedure, and provides: "(1.) The tribunal for the purposes of Part I. of this Act "shall be the county court within the district of which the "premises or any part thereof are situated acting under and "in accordance with this section." Then there are provisoes which do not matter. Sub-s. 2 is as follows: "Where "proceedings are commenced in the county court in respect "of any claim or application under Part I of this Act and are "not transferred to the High Court, the matter shall, unless "the parties otherwise agree, or it is otherwise prescribed, "stand referred for inquiry and report to such one of the panel "of referees appointed by the reference committee hereinafter "mentioned as may be selected by the county court, as if with "the consent of the parties the matter had been so referred "to him in pursuance of s. 6 of the County Courts Act, 1919." Section 6 of the County Courts Act of 1919, or its equivalent, is now s. 90 of the County Courts Act, 1934.

The nature of the goodwill which is referred to in the Landlord and Tenant Act, 1927, was considered by a Divisional Court in *Whiteman Smith Motor Co. Ld.* v. *Chaplin and Another* (1). There were judgments by Scrutton L.J. and Maugham L.J., which have often been referred to in connexion with the application of the Act. It is clear from that decision that goodwill which results from the position or from the site of the premises in question is not goodwill which the lessee can rely on, either for compensation or for a new lease. This was a case in which admittedly a large part of the business and the goodwill which attached to the garage was due to its proximity to the hotels, and therefore was something on which the lessee could not rely. Of course, it did not follow that the other business which came to this garage was necessarily business which fell within the goodwill, as it has to be construed in the light of the Act and decisions upon the Act. That was the nature of the dispute as it appeared before the referee.

By Or. 19, r. 2 of the County Court Rules, 1936: (1) "Subject "to any order of the judge as to the conduct of the reference" —this relates generally to cases under s. 90 of the County Courts Act, 1934 "(*f*) The registrar or referee may submit "any question arising in the inquiry for the decision of the "judge"; and then (*g*): "The report shall be in writing and "shall be filed in the court office, and the registrar shall: "(I.) give notice to all parties of the filing of the report." Then by para. (*h*): "When the report has been filed, (i) if the "further consideration of the proceedings has been adjourned "to a day named, any party may apply on that day to the "judge to adopt the report, or may give not less than three "clear days' notice of his intention to make an application "on that day to vary the report, or to remit the report or any part "thereof for further inquiry or report," or (ii) "if the further "consideration has not been adjourned to a day named,

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(1) [1934] 2 K. B. 35.

C. A.
1949
Schooley
v.
Nye.
Somervell L.J.

"any party may, on not less than three clear days' notice, "apply to the judge to adopt or vary the report, or to remit "the report or any part thereof for further inquiry and report." These rules clearly show, I think, that the report is a document which has to be filed—which will be the basis of the further proceedings, though it is clear, of course, that it does not bind the county court judge.

Then by Or. 40 (Landlord & Tenant Act, 1927) r. 5: "The referee shall complete his inquiry and file his report "within a period of four weeks from the receipt by him of the "notice of his appointment, unless that period is enlarged by "the court, and at the same time shall file a statement of his "claim for remuneration and expenses."

When the matter came on before the county court judge, the report and the supplemental report having been received in this way, the judge, according to his note, said: "I said "that to my mind very considerable difficulty remained; "and that the referee had kindly seen me; and in answer to "the question—'would any proposing lessee be likely to be "'affected as regards the rent that he would pay by the "'alleged existence of adherent goodwill vested in the tenant?,' "it seemed he thought not and that he had felt great "doubt and difficulty in making his report. I said that both "the referee and I must follow the process set out by "Scrutton L.J., and that I saw great difficulty in doing so on "the materials available, so as to arrive at an answer to the "question what (if any) adherent goodwill was created by the "lessee during the term of his lease—what has accrued to the "landlord as additional value of his reversion?" That incident is the basis of this appeal. Mr. Paull submitted on behalf of the applicant that that constitutes—I am using a neutral word—an irregularity in the proceedings as a result of which this court must set aside the order which the judge made. The matter proceeded with argument, and the county court judge gave his decision. We have, without objection by Mr. Paull, been supplied with a note made by Mr. Carter, who was the junior counsel for the landlord—a rather fuller note—of what happened which, I think, is important. It is important in this respect, that one of the matters which one naturally considers is whether the point was taken in the court below. Mr. Paull has submitted that it was the type of point which did not need to be taken at all, but obviously it is more satisfactory that it should have been taken, and I am not satisfied that it did not have to be. This note satisfies me that the point was substantially taken. It is clear that objection was taken to that conversation with the referee. According to this note, the county court judge suggested various courses: should it be sent to another referee, or should it be sent back to this referee? Both parties agreed that the case should proceed.

Mr. Salmon suggested that, even if the point was taken or indicated, the fact that the applicant elected to go on before the judge precluded him from taking the point here. I do not think that it does so preclude him. When points are taken no one can say for certain whether they are good ones or not. I think that the applicant was entitled to take the line, " Well, I object to this, but go on. If we go to the Court of " Appeal and it turns out that the point is a bad one, there is " your judgment; if the point is a good one then not much " time will have been wasted, because we are here with all " the documents available." I think that any difficulty which might have arisen as to the point not being taken is removed by what took place before the judge. The matter proceeded; there was argument; and the county court judge gave a judgment, very little of which I need read. He decided that there was no adherent goodwill. He makes a reference, which I think should be read, to this interview with the referee. He said: " He kindly gave me an opportunity of seeing him and I asked " him whether he thought the suggested goodwill could affect " the bargain which a new lessee would make, but I got no " answer which assists me." The county court judge, on the report and on the evidence before him, he being the final court to decide this matter, decided that there was no adherent goodwill. Mr. Paull, I think, admitted that he would have been in great difficulty, apart from the point of this conversation, in asking this court to interfere with the decision at which the county court judge had arrived.

That brings me to the point which we have to decide: Is this such an irregularity as to entitle Mr. Paull to have the decision set aside? We were referred to *Richardson* v. *Redpath, Brown & Co. Ld.* (1). That case concerns assessors, or, rather, the position of a medical referee in a workman's compensation case, and I do not think that it assists us in the present problem. We have to consider a communication between a county court judge and a referee. Mr. Salmon, who argued the case for the landlord, admitted that one can imagine things being said which would be quite wrong. Having quoted that from Mr. Salmon's argument, let me make it perfectly plain that the county court judge in this case was, of course, actuated by the best possible motives. He was troubled about the case and felt that there was a difficulty about it. He thought that he might save costs and assist the general course of justice by seeing the referee. No one is attacking or impugning his motive in any way. But, of course, notwithstanding his motive, he may have done something which is not sanctioned by the procedure, and which really vitiates the proceedings. At one time in his argument Mr. Salmon submitted that the only effect which this conversation could have had was on the referee's mind. I do not so read the notes which we have with regard to it. I think that the county court judge took a view of this case which, no doubt, everybody is agreed is a possible view. He put it to the referee, and I think it possible that the attitude which the referee adopted when the question was put to him is a matter which might have influenced the county court judge's mind in coming to his final conclusion. In those circumstances, without finding as a fact—it is not necessary to do so—that his mind was influenced, still less suggesting that he was doing anything but seeking to arrive at a proper and fair decision between the parties, I think that that incident does entitle the applicant to have the judgment set aside. It is unnecessary to decide any case other than the present, but I would like to say that the rules to my mind plainly contemplate that the report should be in writing. They set out in detail the circumstances in which further reports can be obtained, or matters can be further elucidated, or cannot be further elucidated, by the referee. Therefore, it is most undesirable that methods of communication between the court and the referee should be resorted to other than those which are clearly pointed to and laid down by the rules. For these reasons I think that this appeal must succeed.

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(1) [1944] A. C. 62.

BUCKNILL L.J. I agree. It seems to me that the action taken by the judge, no doubt with good intentions, was contrary to the procedure laid down by the Act and the relevant rules, and that his action was in excess of his jurisdiction. The result of the interview between him and the referee was, in effect, to cancel the operative part of the report. I also think that the appeal should be allowed.

DENNING L.J. It is, of course, settled practice that an appellate court is entitled on an appeal to consult the judge who tried the case. At one time, indeed, it was not unusual for the trial judge to form one of the court in banc which heard what might in effect be an appeal from him. That can no longer happen, but the practice of an appeal court consulting the trial judge has continued right up to the present time, though it is now infrequent except in criminal cases. The Criminal Appeal Act, 1907, not only contemplates but requires that the Court of Criminal Appeal shall have before them a report from the judge who tried the case, giving his opinion of it; and that is a report which the prisoner and his counsel do not see and have no right to see.

I do not think that this practice applies as between a referee who makes a report and the judge who tried the case. The judge is, after all, the trial judge, and he has to decide the case on information properly before him, whether it be in the shape of a report or in the shape of evidence. Each side must have an opportunity of dealing with any information adverse to his case. If and in so far as that information comes from the referee and is embodied in the written report or a supplemental report to which the parties have access, justice is not only done but is manifestly seen to be done. But if the information comes by word of mouth in a private conversation, when the parties are not present, justice may perhaps be done, but it is not seen to be done; and one or other of the parties will go away with the feeling that the case has been decided against him behind his back. It is elementary in our jurisprudence that justice must not only be done but must also manifestly be seen to be done.

It must be remembered that the parties have the right to apply to vary the report or to ask the judge to hear further evidence; and, as Scrutton L.J. said in *Simpson* v. *Charrington & Co. Ld.* (1), " a motion to vary the report is necessary if it " is to be challenged." How can parties do this if they do not know the terms of the report? And how can they know the terms of the report unless it is in writing? Order 19, r. 2 (*g*), of the County Court Rules, 1936, specifically requires that the report shall be in writing, and I see no justification for an oral report such as was given in this case. I agree that the appeal shall be allowed.

(1) [1934] 1 K. B. 64, 76.

C. A.
1949
SCHOOLEY
v.
NYE.

BUCKNILL L.J. The appeal will be allowed, and with the consent of both parties, and both parties applying to us under s. 21, sub-s. 1 (*b*) of the Landlord and Tenant Act, 1927, to transfer this matter to the High Court, we make the appropriate order to that effect.

Appeal allowed.

Solicitors for the applicant : *Cripps, Harries, Hall & Co.*
Solicitors for the landlord : *Finch, Turner & Tayler.*

C. G. M.

C. A.
1949
Oct. 20, 21;
Nov. 9.

BLACKMILL LD. *v.* STRAKER.

Landlord and tenant—Rural workers—Grant made by local authority to improve dwelling-house—" Normal agricultural " rent—Rent determined by local authority—Rent not liable to subsequent increase—Housing (Rural Workers) Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 56), *s.* 3—*Housing (Rural Workers) Amendment Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 35), *s.* 4.

Rent restriction—Application of rent control to dwellings within Housing (Rural Workers) Act, 1926—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 2 (*c*).

A tenant had held a dwelling-house within the provisions of the Rent Restriction Acts since 1914. In 1938 her then Landlords obtained a grant under the Housing (Rural Workers) Act, 1926, from the local authority to assist in the execution of certain works to the premises. The works were duly executed. It was common ground that they did not have the effect of converting the house into a new house but were merely works of repair and improvement. It was also treated as common ground for the purpose of the case that, notwithstanding s. 128 (*c*) of the Housing Act, 1936, the house was not a dwelling-house under which the local authority was required by that section to keep a housing revenue account. The rent after the execution of the works was fixed in accordance with the provisions of s. 3 of the Act of 1926 at 3*s.* 11*d.* a week excluding rates. As there had been an increase in the rents normally paid by agricultural workers in the district, the landlords applied to the local authority for permission to increase the rent of the premises. The local authority, being satisfied that there had been an increase in the rent normally paid by agricultural workers, authorized an increase of the rent to 5*s.* 10*d.* a week, excluding rates. Accordingly, the landlords served a notice on the tenant increasing her rent from April 1, 1948, to 5*s.* 10*d.* a week which, with rates, made 7*s.* 11*d.* a week. The tenant having refused to pay, the landlords in these proceedings claimed arrears of rent on the basis of the increased rent. The county court judge gave judgment for the landlords.

Held, allowing the appeal, (1.) that, on the true construction of the Housing (Rural Workers) Act, 1926, as amended by the Housing (Rural Workers) Amendment Act, 1938, "the normal "agricultural rent" appropriate to the premises having been arrived at pursuant to the provisions of s. 3, sub-s. 1 (ii), on the facts as they stood in 1938, the rent could not be subsequently increased by reference to a general increase in the level of agricultural rents in the district since that date; (2.) that there was no conflict between the Housing (Rural Workers) Acts and the Rent Restriction Acts as to the rent payable in respect of premises within the ambit of both Acts, since the Rent Restriction Acts provided one maximum rent and the Housing (Rural Workers) Acts another maximum rent, and the rent payable must not exceed either of the maxima; and that the provisions of the Rent Restriction Acts in regard to the rent payable in respect of the house continued to apply.

Roberts v. *Jones* [1947] K. B. 221, distinguished.

Rose v. *Hurst* [1949] 2 K. B. 372, considered.

APPEAL from Kingston-upon-Hull county court.

The appellant, Mrs. Straker, had since 1914 been tenant of No. 7, High Street, Patrington, a cottage within the provisions of the Rent Restriction Acts. In 1938 her then landlord obtained a grant of 463*l.* 10*s.* 0*d.* under the provisions of the Housing (Rural Workers) Act, 1926, from the East Riding of Yorkshire County Council to assist in the execution of certain works to those and certain other premises. The works were duly completed, and it was common ground between the parties that they were merely works of repair and improvement and did not have the effect of converting the cottage into a new one. After the works were completed, the rent of the premises was duly fixed in accordance with the provisions of s. 3 of the Housing (Rural Workers) Act, 1926, at 3*s.* 11*d.* a week, excluding rates. The respondents, Blackmill Ld., purchased the premises in 1946, and, contending that there had been an increase in the rents normally paid by agricultural workers in the district, they applied to the East Riding County Council for permission to increase the rent of the premises. The council, being satisfied that there had been such an increase in rents in the district, gave permission to raise the rent to 5*s.* 10*d.* a week. The rent, including rates, on this footing was 7*s.* 11*d.* a week. When this permission was granted to raise the rent, it was expressed to be subject to the provisions of the Rent Restriction Acts so far as they affected the premises. The landlords accordingly served notice on the tenant raising her rent to 7*s.* 11*d.* a week. The tenant refused to pay the increase, and the landlords in these proceedings claimed 16*l.* 12*s.* 6*d.* arrears, which were assessed on the basis of the increased rent.

It was common ground between the parties that, notwithstanding the provisions of s. 128 (*c*) of the Housing Act, 1936, the cottage was not a house in respect of which the local authority was required by that section to keep a housing revenue account.

The county court judge gave judgment for the landlords. The tenant appealed.

A. W. Stephenson for the tenant. This cottage has always been within the Rent Restriction Acts. The fact that a grant was obtained under the Housing (Rural Workers) Act, 1926, to assist in the execution of certain works did not take the house out of the protection of the Rent Restriction Acts. It is submitted that, when once the rent of a house in respect of which assistance has been given under the Act has been fixed in accordance with the provisions of s. 3 of the Act (1) (as amended), the council has no power subsequently

(1) The Housing (Rural Workers) Act, 1926, s. 3, sub-s. 1, as amended by s. 4 of the Housing (Rural Workers) (Amendment) Act, 1938: "In the case of a "dwelling in respect of which "assistance had been given under "this Act by way of grant the "following conditions shall, "subject as hereinafter provided, "apply in relation to the dwelling "for a period of twenty years "from the date on which it first "becomes fit for occupation "after the completion of the "works and shall so long as they "continue to have effect be "deemed to be part of the terms "of any lease, agreement for a "lease, or tenancy of the "dwelling, and shall be "enforceable accordingly . . . . "(*b*) The rent payable by the "occupier in respect of the "dwelling shall not exceed the "amount of the normal "agricultural rent, increased by "a sum equal to three per cent. "of the amount by which the "estimated cost of the works "in respect of which assistance "has been given exceeds the "amount of the assistance given "by way of grant, and no fine, "premium or other like sum shall "be taken in addition to the "rent. For the purposes of this "provision the expression "'normal agricultural rent' "means—(i) in the case of a "dwelling which had not "previously to the execution of "the works been, or which was "not within the period of five

to vary the rent. The words "from time to time" cannot be read into the section. Section 3, sub-s. 2 (*c*), of the Rent and Mortgage Interest Restrictions Act, 1939 (1), expressly excludes from the ambit of the Rent Restriction Acts those houses within the Housing (Rural Workers) Act, 1926, in respect of which a local authority has to keep a housing revenue account under s. 128 of the Housing Act, 1936 (2). It follows that those houses within the Act of 1926 in respect of which a local authority is not required to keep a housing revenue account remain within the Rent Restriction Acts.

"years immediately preceding "the execution of the works "separately let as such, the rent "which the local authority determined to be the rent normally "paid by agricultural workers "in the district, or, if it appears "to the local authority that "the number of agricultural "workers in the district is "insufficient for the determination "of any sum as being such rent "as aforesaid, the rent normally "paid by persons of substantially "the same economic condition "in the district; and (ii) in the "case of a dwelling which was "separately let as such at any "time within the said period of "five years, the average amount "determined by the local "authority to have been "payable by way of rent per "week during the period of the "letting: Provided that, if in "the case of a dwelling to which "paragraph (ii) applies the "amount of the normal agricultural rent payable in "respect thereof is by reason of a "general increase of rents in the "district less than the rent "normally paid by agricultural "workers in the district, or, if "it appears to the local authority "that the number of agricultural "workers in the district is "insufficient for the determination of any sum as being such "rent as aforesaid, then the rent "normally paid by persons of "substantially the same economic "condition in the district, the "rent so normally paid shall be "taken to be the normal "agricultural rent."

(1) Rent and Mortgage Interest Restrictions Act, 1939, s. 3, sub-s. 2: "The principal Acts "shall not, by virtue of this "section apply . . . . (*c*) to any "dwelling-house being, or "forming part of, a house or "dwelling in respect of which a "local authority for the purposes "of Part V of the Housing Act, "1936, are required by s. 128 of "that Act to keep a Housing "Revenue Account, other than "a house or dwelling to which "sub-s. (3) of s. 129 of that "Act applies."

(2) Housing Act, 1936, s. 128: "Subject to the provisions of this "section, every local authority "for the purposes of Part V "of this Act shall keep an "account (to be called the "Housing Revenue Account) of "the income and expenditure of "the authority in respect "of— . . . . (*c*) all dwellings in "respect of which either (i) the "authority have received "assistance under section one "of the Housing (Rural Workers) "Act, 1926— . . . ."

C. A.
1949

BLACKMILL LD.
v.
STRAKER.

[He referred to *Bishop of Gloucester* v. *Cunnington* (1) and *Roberts* v. *Jones* (2)].

R. W. Payne for the landlords. It would be unjust that these premises should be subject to control under both the Act of 1926 and the Rent Restriction Acts. The Act of 1926 is a special one. It follows that the provisions of the Rent Restriction Acts which are general do not apply at all to houses within the Act of 1926. *Bishop of Gloucester* v. *Cunnington* (1) shows that, where premises are subject to special legislation, the provisions of the Rent Restriction Acts do not apply to them. The decision in *Roberts* v. *Jones* (2) is authority for the proposition that those Acts do not apply. The Act of 1926 lays down a complete code. So far as the Rent Restriction Acts and the Act of 1926 cannot operate together, the Act of 1926 must prevail. It is clear that s. 3, sub-s. 2, of the Act of 1933 excludes from the operation of the Rent Restriction Acts houses in respect of which a local authority must keep a housing revenue account. As a matter of law a housing revenue account should have been kept in respect of these premises. [Counsel referred to *Insall* v. *Nottingham Corporation* (3) per Tucker L.J. and *Rose* v. *Hurst* (4).

Stephenson in reply. The amending Act of 1938 removed from s. 3, sub-ss. 1 and 2, of the Act of 1926 the words "for the time being." This makes it clear that a local authority cannot authorize an increase in rent when once the rent has been fixed in accordance with the provisions of the Act of 1926. Section 3, sub-s. 2, of the Act of 1939 makes it clear that, as the local authority is not required to keep a housing revenue account in respect of these premises, they remain within the Rent Restriction Acts.

Cur. adv. vult.

Nov. 9. EVERSHED M.R. read the following judgment of the court.

The appellant in this case, Mrs. Straker, is the occupant of a cottage, No. 7, High Street, Patrington. We were informed that she has in fact occupied the cottage since a date prior to 1914. It is conceded, further, on behalf of the respondents, her present landlords, that, apart from the effect

(1) [1943] K. B. 101.
(2) [1947] K. B. 221.
(3) [1949] 1 K. B. 261, 272.
(4) [1949] 2 K. B. 372.

which the Housing (Rural Workers) Act, 1926 (as varied by the Amendment Act of 1938), may have upon it, the premises are and have ever since 1914 been within the scope of the relevant rent restriction legislation.

In the present action the substantial question raised is that of the validity of an increase in her rent which the landlords have sought to impose. The actual figures do not for present purposes matter, and are complicated by an addition in respect of rates. It is, however, clear that the rent that the tenant was paying immediately before the increase which she challenges represents (*a*) the maximum rent fixed under the relevant provisions of s. 3 of the Act of 1926 at the date of the completion of the works done pursuant to that Act in 1938, and (*b*) the standard rent of the premises under the Rent Acts.

The tenant is entitled to succeed in this appeal, therefore, and to challenge successfully the validity of the attempted increase in her rent, if she can establish *either* of the two following propositions, namely, (*a*) that, on the true construction of the Act of 1926 as amended, the maximum or " normal " agricultural " rent ascertained thereunder is not liable to variation and particularly to increase by reference to circumstances occurring after the date of the execution of the relevant works; or (*b*) that the application of the Rent Acts in regard to standard rent is not displaced or excluded by the Act of 1926 during the period when the provisions of the latter Act are applicable to the premises. The county court judge rejected the tenant's contentions under both heads, and we have heard argument on both in this court. We are much indebted to counsel for the assistance they have given to us on what have appeared to us to be matters of considerable difficulty on the construction of and conflict between Acts of Parliament.

Before proceeding to state our conclusions on the two points, it is convenient to restate two other agreed matters of fact recorded by the county court judge, viz., (I.) that the works done upon the premises, in and before the year 1938, in respect of which the tenant's then landlords received a grant pursuant to the Act of 1926 from the East Riding of Yorkshire County Council, did not have the effect of converting the premises into new premises, that is, of destroying their previous identity, as was held by this court to have been the result of the works done in *Roberts* v.

Jones (1) to which we shall later refer; (2.) the house is not one in respect of which the relevant local authority (since it is a county council) for the purpose of Part V. of the Housing Act, 1936, is required by s. 128 of that Act to keep a Housing Revenue Account; with the result that s. 3, sub-s. 2 (*c*), of the Rent and Mortgage Interest (Restrictions) Act, 1939, does not apply expressly to exclude the application of the Rent Acts to the premises.

We turn now to the first of the two contentions of the tenant. The relevant language of s. 3 of the Act of 1926 as it stood before amendment is as follows: Sub-section 1: "In the case of a dwelling in respect of which assistance "has been given under this Act by way of grant the following "conditions shall, subject as hereinafter provided, apply in "relation to the dwelling for a period of twenty years from the "date on which it first becomes fit for occupation after the "completion of the works and shall so long as they continue "to have effect be deemed to be part of the terms of any lease, "agreement for a lease, or tenancy of the dwelling, and shall "be enforceable accordingly." Then (*a*) is not relevant. "(*b*) The rent payable by the occupier in respect of the dwelling "shall not exceed the amount of the normal agricultural "rent, increased by a sum equal to three per cent. of the amount "by which the estimated cost of the works in respect of which "assistance has been given exceeds the amount of the "assistance given by way of grant, and no fine, premium or "other like sum shall be taken in addition to the rent."

Then comes the definition, upon which the matter largely turns. "For the purposes of this provision the expression "'normal agricultural rent' means—(i) in the case of a "dwelling which had not previously to the execution of the "works been, or which was not within the period of five "years immediately preceding the execution of the works "separately let as such, the rent which the local authority "determine to be the average rent for the time being paid "by agricultural workers in the district; and (ii) in the case "of a dwelling which was separately let as such at any time "within the said period of five years, the average amount "determined by the local authority to have been payable "by way of rent per week during the period of the letting: "Provided that, if in the case of a dwelling to which para-"graph (ii) applies the amount of the normal agricultural

(1) [1947] K. B. 221.

"rent payable in respect thereof is by reason of a general "increase of rents in the district less than the rent normally "paid by agricultural workers in the district, the rent so "normally paid shall be taken to be the normal agricultural "rent."

It is unfortunate that it was on this, the unamended, language of s. 3 of the Act that the county court judge reached his decision, for it is clear that he placed considerable reliance on the point, conceded before him on the tenant's behalf, that, had her rent fallen to be determined by reference to paragraph (i) of the definition of "normal agricultural rent" instead of (as the fact is) by reference to paragraph (ii), it would have been liable to increase or variation in accordance with the average "for the time being" paid by agricultural workers in the district. There is, to say the least, a strong argument for the view that, if a rent determined in reference to paragraph (i) of the definition is variable, so in logic should be a rent determined in reference to paragraph (ii).

But the terms of the definition have been materially altered by the Housing (Rural Workers) Amendment Act, 1938, which does not appear to have been brought to the attention of the county court judge. In particular, the phrase "for "the time being" in paragraph (i) of the definition has now been removed. As amended, the two paragraphs of the definition and the proviso to the second now read as follows: [His Lordship read the amended proviso.]

As we have already stated, the premises here in question have been continuously let to the tenant since at least the year 1914. It is clear that, applying paragraph (ii) of the definition of "normal agricultural rent," apart from the proviso, the figure arrived at would be fixed and finally fixed for the whole twenty years' period contemplated by the section (subject only to the owner's rights on repayment of the grant) by reference to the average weekly payments made by the tenant before the execution of the works. It is equally clear that the effect of the proviso is that some increase in the sum so calculated may be made if justified by reason of "a general "increase of rents in the district." The question is whether the "general increase" contemplated is one experienced up to but not beyond the date when the rent has to be first determined (in this case the date of the execution of the works), or whether it is one experienced at any time and from time to time during the period when the statutory restrictions apply.

It is, we think, true to say that phrases such as "normal "agricultural rent," and "rent normally paid by agricultural "workers in the district . . . . or . . . . normally paid by "persons of substantially the same economic condition," when applied to a substantial period of time such as twenty years, are at any rate apt to import the notion of variability in accordance with changes in the relevant economic circumstances during that period; and if the figure arrived at under the corresponding definition (i) were shown to be variable during the period, we should find it difficult to resist the conclusion that the figures under definition (ii) were similarly intended to be variable. But, as a matter of English, the words and phrases to which we have alluded in our judgment are also properly referable to a particular point of time, for example, the date when the works were undertaken. And it is to be observed that there is nowhere found in the introductory sentences of sub-s. 1 or, now, in the definition paragraphs of (*b*), as there is in paragraph (*c*), the common phrase "from time to time," or other similar formulæ. And if the words "for the time being" in definition (i) could properly have been relied on to show an intention that the normal agricultural rent under that part of the paragraph was a variable figure, it is to be noted that those words, as part of the 1938 amendment, have now been removed and that their place has not been taken by any corresponding language.

It is further to be observed, as it seems to us, that, if the normal agricultural rent is under either branch of the definition liable to variation, it would appear to follow that any increase justified at one point of time should thereafter cease to be justified if there followed a fall in the relevant level of rents; and in the case of a rent determined under (i) the proper figure might fall below the figure appropriate at the date of the original determination. Such a result would plainly be inconvenient, particularly in the light of the landlord's obligation under paragraph (*c*) to certify from time to time that the conditions of the preceding paragraphs are being complied with. No doubt the landlord would prima facie be protected by the local authority's determination; but we are not satisfied that such a determination would necessarily be available in all cases on the strict wording of definition (ii). In any case, the section does not appear to contemplate any procedure whereby, if there is a general fall in rent levels, the tenant could apply to the local authority and require it to determine afresh the amount of the normal agricultural rent.

C. A.

1949

BLACKMILL LD. v. STRAKER.

For these reasons we have reached a conclusion different from that arrived at by the county court judge who, as we have said, had not had brought to his attention the amendments made in the Act of 1926 by that of 1938. In our judgment the normal agricultural rent appropriate to the present case, having been arrived at pursuant to definition (ii) on the facts as they stood in 1938, cannot now be increased by reference to a general increase in the level of the relevant rents since that date.

Whether, in any case under para. (ii) of the definition, where the house on which the works had been executed was not occupied by a tenant until, say, ten years after the execution of the works, the " normal agricultural rent " would have to be determined at the date when such tenancy began or at the date of the execution of the works, it is unnecessary to determine ; for on the facts of the present case the appellant has been the tenant at all relevant times.

If this conclusion is right, the tenant is entitled to succeed, and it is not strictly necessary to consider the second point, namely, the applicability of the Rent Acts. But, as the case is of some importance and the matter was very fully argued, we think it right to express our opinion also on this point.

As we have said, the circumstances of the present case taking it outside the terms of s. 3, sub-s. 2 (*c*), of the Act of 1939, it cannot in our judgment be regarded as directly covered by the authority of *Roberts* v. *Jones* (1), for in that case, as we understand the facts, the house in question was one in respect of which the relevant local authority was required to keep a housing revenue account.

It is true, however, that certain passages in the judgment of Scott L.J. and his invocation of the maxim generalia specialibus non derogant seem to go beyond the strict requirements of the decision, and were naturally and properly considered as of weight by the county court judge. Scott L.J. said (2) : " That raises a question of first principle, on which " there is no direct authority, though there is authority which " is relevant. In my view, the Housing (Rural Workers) " Acts impose a status upon the house in exactly the same " sense as do the Rent Restrictions Acts. That, I think, " leads to the necessary conclusion of law that the Rent " Restriction Acts are not intended to apply to houses the rent " of which is fixed within the Housing (Rural Workers)

(1) [1947] K. B. 221. (2) Ibid. 224.

C. A.

1949

BLACKMILL LD. *v.* STRAKER.

"Acts." He then refers to *Neale* v. *Jennings* (1), and proceeds: "This court decided that the Rent Restriction "Acts, being general Acts, did not apply to a house governed "by special legislation of that kind, on the principle of the "maxim generalia specialibus non derogant. That same "principle applies, though in a different way, I think, to the "Rent Restriction Acts generally. They constitute general "legislation. The Housing (Rural Workers) Acts are special "legislation. Prima facie the general is not intended to over-"ride or to conflict with the special legislation, and that, "in my opinion, is the proper interpretation to be put on the "Rent Restriction Acts."

It is to be noted that the Lord Justice qualifies his observation in the last sentence by the words "prima facie"; and, given that one of two apparently conflicting Acts can be defined as "special" and the other as "general," his statement so qualified could not, we think, be open to question. Our main difficulty in the present case in applying the maxim so as wholly to exclude from the Rent Acts all houses comprehended by the Housing Act, 1926, arises from the terms of s. 3, sub-s. 2 (*c*), of the Rent and Mortgage Interest Restrictions Act, 1939, itself. The express reference to s. 128 of the Housing Act, 1936, in s. 3, sub-s. 2 (*c*), of the Act of 1939 shows that Parliament must have had in mind the reference in s. 128 to the Act of 1926. If, therefore, as we think, Parliament expressly and deliberately excluded wholly from the ambit of the Rent Acts certain, but certain only, of the houses falling within the Act of 1926, namely, those in respect of which a housing revenue account had to be kept, we feel compelled to hold that by necessary implication those houses within the Act of 1926 which were not so excluded by s. 3, sub-s. 2 (*c*), of the Act of 1939 were intended not to be excluded. Unless, therefore, we are compelled by some irreconcilable conflict to hold otherwise, we are of opinion that the provisions as to standard rent in the Rent Acts continue to apply to the present house.

In cases arising under the Pluralities Act, 1838—such as *Bishop of Gloucester* v. *Cunnington* (2), there is such an irreconcilable conflict in regard to the right to obtain possession. Lord Greene M.R. there said: "This review of "the relevant statutory provisions which were in force when "the Rent Restriction Acts were passed shows that parsonage

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(1) [1946] K. B. 238.

(2) [1943] K. B. 101, 104.

"houses are placed by the legislature in a category by "themselves. Save where a licence is obtained, residence "by the incumbent in a parsonage house is compulsory. "An incumbent who fails to reside in the house can be ordered "to do so, and an occupier can be compelled to make room "for him. The reasons for this special treatment are of a "spiritual nature, and are based on the necessity for ensuring "that the cure of souls shall be conducted by an incumbent "residing, not only in the benefice, but in the parsonage "house itself which is provided to enable him to perform "his spiritual duties and (what is important) the duties of "hospitality connected therewith. These considerations make "it, in our view, impossible to suppose that the legislature "intended that where a parsonage house has been let the "tenant should have the protection of the Rent Restriction "Acts. Particular confirmation of this view is to be found "by a consideration of s. 59 of the Pluralities Act, 1838. "Under that section, as has been already pointed out, every "lease of a parsonage house can be avoided and the tenant "evicted whenever the Bishop orders the incumbent to "reside in the house. If the Rent Restriction Acts apply "to such a house they must impliedly have repealed the "provisions of that section under which possession can be "obtained to enable the incumbent to reside. It is, in our "view, impossible to think that any such implied repeal "could have been intended."

Similarly in the recent case of *Rose* v. *Hurst* (1) an irreconcilable conflict arose between the right of the tribunal under the Landlord and Tenant Act, 1927, to determine a fair rent between a willing lessor and a willing lessee and the standard rent imposed by the Rent Acts which negatives the conception of free bargain: see for example the language of Denning L.J. (2): "Those two sections cannot possibly "apply at one and the same time to the self-same premises. "Under the Landlord and Tenant Act, 1927, a tribunal has "got to 'determine' what the rent is to be. But if it has already been fixed by the Rent Restriction Acts, there is nothing "for the tribunal to determine. Again under the Landlord "and Tenant Act the rent is to be that which a 'willing' "lessee would agree to give and a 'willing' lessor would "agree to accept. But if the Rent Acts apply, the rent is "fixed without regard to what either is 'willing' to do.

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(1) [1949] 2 K. B. 372.

(2) Ibid. 375.

C. A.

1949

BLACKMILL LD. v. STRAKER.

"So the two provisions are inconsistent one with the other. "The task of this court is to say, in the circumstances, "which provision is to prevail. The Act of 1927 is later "and more specific than the Act of 1920, and must, I think, "be taken to prevail."

We add that it does not seem to us to follow from the decision of this court in the last mentioned case that the premises there in question were necessarily taken out of the scope of the Rent Acts for all purposes and for all time, for example, on the falling in of a new lease then granted.

If and in so far, therefore, as there is any direct conflict between the two Acts here in question, the courts may no doubt have to resolve the conflict by choosing one or the other as it did in *Rose* v. *Hurst* (1), but there is at the least a large field where there is no conflict and in which each Act must be given its full effect. When a landowner repairs his farm cottages with his own money entirely and their identity is not thereby destroyed, the tenants clearly remain protected by all the provisions of the Rent Acts. They cannot be turned out and their rents cannot be raised. It would be a remarkable thing if they should entirely lose the protection of the Rent Acts simply because the landowner receives a grant from the county council to help him to do the repairs. We are satisfied that that is not the result of the Acts. There is no conflict between the Acts as to the rent payable. The Rent Acts provide one maximum rent. The Rural Workers Acts provide another maximum rent. The rent payable must not exceed either of the maxima. Whether there is such a conflict as regards security of tenure may be another matter. The question does not arise in this case, we have heard no argument on it, and we prefer, therefore, to express no opinion.

In the result, therefore, we think that the provisions of the Rent Acts in regard to the rent payable in respect of this house continue to apply. As we have already stated, the precise point which has arisen in the present case did not arise in *Roberts* v. *Jones* (2); and although we do not, of course, in any way question the correctness of the decision in that case, we think that the principle stated by Scott L.J. in the first of the two passages from his judgment which we have quoted above does not lead to so broad a conclusion as he formulated. We are unable to agree, for the reasons which we have stated, that the Rent Acts are not

(1) [1949] 2 K. B. 372.

(2) [1947] K. B. 221.

intended to have any application to any houses falling within the Housing (Rural Workers) Acts.

The tenant, therefore, in our judgment is also entitled to succeed on this part of her case.

Appeal allowed.

Solicitors. *Smith and Hudson, for Mainprize, Rignall and Whitworth, Hull; Steavenson and Couldwell, for E. B. Burstall, Hull.*

B. A. B.

EDLER v. AUERBACH.

1949
July 7, 8, 11, 27; *Oct.* 12.

Devlin J.

Contract—Lease—Illegality—Defence regulation prohibiting professional use of premises—Misrepresentation by lessor—Mistake of fact—Demise of premises for professional purposes—Lessee's payment of rent in advance—Lessor debarred from enforcing lease—Lessee's remedies—Money had and received—Unjust enrichment—Defence (*General*) *Regulations*, 1939, *reg*. 68 *CA* (1).

On October 30, 1945, reg. 68 CA of the Defence (General) Regulations came into force, providing that "no person shall, "except with the consent of the local housing authority, use for "purposes other than residential purposes any housing accommo"dation which has been used for residential purposes at any time "since December 31, 1938." With knowledge of that regulation the defendant, having taken a lease of the house and occupied the ground floor as an office in 1946, entered into negotiations with the plaintiff, a solicitor, for the demise to him as offices of the second floor. He informed the plaintiff, in reply to the latter's inquiry, that the house had not been used for residential purposes since December 31, 1938. That statement was, however, contrary to facts which the defendant had himself earlier ascertained. On March 31, 1947, the defendant demised the second floor to the plaintiff for six months, and on April 11, 1947, the plaintiff sent the defendant a cheque for 111*l*. by way of rent in advance for the first quarter. The plaintiff removed a bath from the premises after receiving from the defendant permission to do so on condition of his replacing it and making good at the end of his lease. In May, 1947, the local housing authority wrote to the defendant that the house was being used in contravention of reg. 68 CA. On May 22, the authority refused consent to use of the house, except the ground and first floors, for professional purposes, but agreed, conditionally, to defer enforcing the regulation against the plaintiff. The plaintiff brought an action claiming return of the 111*l.* on various grounds, and rescission of the lease. The defendant counterclaimed for 414*l.* consisting of rent and damage to the structure by removal of the bath. The plaintiff did not plead fraud, but alleged of the agreement that it was illegal on its face.

(1) *Held*, that the lease was not illegal on its face, since the regulation concerned not the letting of premises but only their use, and the tenant's covenant to use them for professional purposes did not impose any positive obligation on him to use them at all, but was merely a negative covenant not to use them otherwise than for professional purposes (secus if the lease had, expressly or impliedly, required the plaintiff to enter into occupation without obtaining the consent required by reg. 68 CA); that the covenant as to professional use of the premises did not constitute evidence of contemplated unlawful performance which evidence would (2) render the lease unenforceable, because the prohibition in the regulation was not absolute and that covenant was therefore consistent with an intention in the parties that the necessary (3) consent would be obtained; that the principle in *Alexander* v. *Rayson* [1936] 1 K. B. 169, 182, that a party to an agreement not in itself unlawful who intends to use the subject matter of the agreement for an unlawful purpose is precluded from suing on it, should be extended to defeat the defendant's counterclaim for rent because, although he did not intend himself to use the house for an unlawful purpose, he intended that the plaintiff should do so, and the plaintiff was the innocent instrument by which the defendant sought to effect his intention that the law should be broken; that, even if a mere intention by the defendant to break the law were insufficient to attract the principle in *Alexander* v. *Rayson* (supra), there was here not merely an intention, but an actual attempt, to break it, and the fact that the attempt was frustrated was immaterial, so that the principle applied; that, even if (which quaere) the resolution of the local authority giving the plaintiff conditional permission to use the second floor for professional purposes legalized that use, the defendant remained debarred by his own conduct from enforcing the lease by way of counterclaim and could not take advantage of the relief granted by the local authority to the plaintiff on account of the latter's innocence in the matter; that, applying the principle in *North Western Salt Co. Ld.* v. *Electrolytic Alkali Co. Ld.* [1914] A. C. 461, as the defendant's fraud had come to the court's knowledge by evidence to which objection was not, though it could have been, taken, the court must take cognizance of that fraud even though it had not been pleaded, and that the court could act on those unpleaded facts, and hold the counterclaim for rent defeated accordingly, because it clearly had all the relevant circumstances in evidence before it; that the counterclaim for neglect to repair (4) similarly failed because it arose out of the lease; that, however, the counterclaim for compensation for damage caused by the

plaintiff's removal of the bath succeeded because that matter arose independently of the lease; that, as the illegality did not affect the validity of the lease (see *Alexander* v. *Rayson* [1936] 1 K. B. 184), the plaintiff was not entitled to a declaration that it was void; that therefore, as the 111*l.* rent had prima facie been properly paid by the plaintiff under a valid agreement, the defendant was entitled to retain it, since the defendant's illegality, while it prevented him from enforcing his rights under the lease, did not by itself give any right of action to the plaintiff; that, as the plaintiff had pleaded only innocent misrepresentation, only the remedy of rescission of the lease was open to him, but that such misrepresentation was no ground for rescission of a lease which had been executed: *Angel* v. *Jay* [1911] 1 K. B. 666, 671, followed; that the principle laid down in *Hart* v. *Windsor* (1843) 12 M. & W. 68, 87, and reaffirmed in *Bottomley* v. *Bannister* [1932] 1 K. B. 458, 468, that there is no implied condition, on the demise of real property, that it is fit for the purpose for which it is let, applied equally where the premises were legally unfit for that purpose as it did in the case of premises physically unfit, and that the plaintiff could accordingly not claim for a breach of implied warranty by the defendant that the plaintiff could use the premises for professional purposes; that, even if the law did imply a warranty of fitness in such a case, there could have been no warranty on the part of the defendant since the matter had been the subject of direct discussion between the parties, and the only possible complaint, therefore, would have been of breach of express warranty, which was not pleaded; that the plaintiff was not entitled to return of the 111*l.* paid for rent as money paid for a consideration which had failed, since the money had been paid under a valid lease no covenant of which had been broken by the defendant, and since the plaintiff, once implied warranty by the defendant was negatived, had obtained what he bargained for even though he had derived no benefit from it; that the 111*l.* was not recoverable as money paid under a mistake of fact, because, while the plaintiff was mistaken in supposing that the premises had not been used residentially after December 31, 1938, he did not make the payment because of that mistake, but because he was obliged to do so by the terms of the lease which was then already executed; that, while the plaintiff might (which quaere) have been able to resist the original demand for the 111*l.* due under the lease on the same grounds as enabled him eventually to defeat the counterclaim, he could not now recover it in the absence of a plea in his statement of claim that he had made the payment under the mistaken belief that that the lease was enforceable by the defendant, and that was not the mistake pleaded; that amendment of the statement of claim to include that plea could not be permitted since it would have involved making the charge of fraudulent misrepresentation; that the plea of money had and received could not succeed on the ground of the defendant's unjust enrichment, since the plaintiff had failed to plead fraudulent misrepresentation on proof of which he could have obtained relief, and accordingly the defendant must be presumed to have acted innocently, in which event for the court to accede to the plea of unjust enrichment would be contrary to the principles on which it granted relief for innocent misrepresentation.

ACTION.

By an agreement dated March 31, 1947, the defendant, Joel Auerbach, let to the plaintiff, Rudolph Edler, rooms on the second floor of No. 9, Mansfield Street, London. The plaintiff agreed to use them for professional purposes only. The plaintiff in the action claimed that the agreement was null and void for illegality. Alternatively, he alleged, first, that the agreement was voidable by reason of an innocent misrepresentation made by the defendant that the premises had not been used for residential purposes since December 31, 1938; secondly, that the agreement was entered into on a mutual mistake of fact respecting that use; and, thirdly, that there was an implied term or warranty in the agreement that he could use the premises for professional purposes and that the warranty had been broken.

The whole of No. 9, Mansfield Street, had been used for residential purposes after December 31, 1938. On and before that date the house was occupied by one Yorke, who held it on a lease from Lord Howard de Walden and used it as a residence. He inhabited it in the ordinary way until the outbreak of war in 1939, when he left it and took away his servants. The furniture remained until September, 1940, when it was removed to storage. Thereafter the house was uninhabited. In about October, 1945, it was brought to the notice of the defendant, an accountant, who was looking for premises which he could use, at any rate partly, as an office, by one Malden of John G. Rutter and Son, a firm of estate agents who were acting for the defendant. They suggested to the defendant that he should obtain an assignment of the remainder of Yorke's lease. There was, however, the difficulty that that lease provided that the premises should be used only for residential purposes, a difficulty which could be surmounted by the grant of a new lease. On October 30, 1945, there came into force reg. 68 CA of the Defence (General) Regulations, by para. (1) of which "no person shall, "except with the consent of the local housing authority, use "for purposes other than residential purposes any housing "accommodation which has been used for residential purposes

1949

Edler
v.
Auerbach.

"at any time since December 31, 1938." The defendant's agents thereupon telephoned to Yorke's agents to ascertain when the premises were last used. As a result, on November 10, 1945, Yorke wrote to his agents that the house was inhabited in the ordinary way until the outbreak of war in September, 1939. By letter dated November 12, 1945, those agents sent the original of Yorke's letter to the defendant's agents, who showed it to him at their office soon after its receipt. The defendant was much concerned, and, wanting further inquiries made, he suggested that the gas or electricity authorities should be approached to find out when the last bills were paid. It was ascertained from the electricity authority that the last bill was paid towards the end of the summer of 1939. Accordingly his agents put it to the defendant that the house was controlled, but he replied that he was going to live there. It had been his intention from the beginning to use the second and third floors as his residence and the rest of the house for his business. Provided that he did that, the regulation would not apply, for, by way of exception to its main provision, it enacted that that provision should not affect the use of any accommodation by a person residing in the building in which the accommodation was situated.

In November or December, 1945, before the formal grant of the new lease to him, the defendant went into occupation of the premises, using the ground floor purely as an office. He found that the cost of repairing the premises for residential use was prohibitive and that probably no licence would be granted. Accordingly he abandoned the idea of residence and continued to use the premises as an office. In so doing he was breaking reg. 68 CA. The lease which he obtained from Lord Howard de Walden in December, 1945, provided that the tenant might use the premises either as a private dwelling-house or for the purposes of offices; and the tenant covenanted to obtain any necessary consent of the local housing authority under reg. 68 CA in respect of the use of any part of the premises for purposes other than residential. The defendant took no steps to obtain that consent.

He decided to sublet the second and third floors, and towards the end of 1946 came into contact with the plaintiff who was looking for office premises. The plaintiff was a solicitor. He had been away during the war and was returning to practice. He was aware of the regulation, and he observed that the house was clearly designed for residence. Negotiations took place in and after December, 1946, and the defendant was pressing the plaintiff to come to a decision. At an interview between them in or about March, 1947, the defendant presented the plaintiff with a draft agreement which he had prepared, and the parties discussed it and agreed on certain amendments. The plaintiff then asked the defendant whether it was alright for him to let the premises for office purposes, and the defendant said that it was. The plaintiff asked whether the premises had been used residentially after the critical date, and the defendant said that they had not. The plaintiff was satisfied with this and made no further inquiries.

The defendant then granted a lease to the plaintiff of two rooms on the second floor for a term of six months from March 31, 1947, and thereafter until determination by either party's giving to the other six months' notice. The rent was 525*l.* payable quarterly in advance, the first payment to be made as from April 10, 1947. The plaintiff covenanted to use and occupy the premises for professional purposes and not otherwise. The agreement was signed by the plaintiff on March 24 or 25, and almost immediately he made telephone arrangements and obtained an estimate and a licence for electrical work which he required. On April 11 he sent the defendant a cheque for 111*l.* 1*s.* 2*d.* for rent from April 10 till the end of the first quarter. On April 14 he was permitted by the defendant to remove a bath from the demised part of the premises on the understanding that he would replace it and make good all defects on leaving. He had decided to sublet one of the rooms, and in the early part of April, 1947, he advertised in a newspaper and received at least one reply. The electricians started work on April 15 before the licence had been granted, the intention of the plaintiff apparently being that he would do as much work as he was permitted to do without a licence. His application for a licence caused the local housing authority, Marylebone Borough Council, to make inquiries about the previous use of No. 9, Mansfield Street, and as a result it was brought to light that the whole of the house had been used for residential purposes from January to August, 1939. On May 13, 1947, the town clerk wrote to the defendant pointing out that his occupation of the ground floor was in contravention of the regulation and enclosing the requisite form to enable him to apply for the council's consent. The defendant replied on May 14 that he was "surprised to learn that the premises were used for "residential purposes from January to August, 1939," and asked for the requisite consent. He was told that his application would be considered by the appropriate committee of the council on May 22.

Meanwhile the plaintiff was in contact with the council and had also heard the true facts and that the defendant's application would be considered on May 22. He attended that meeting, but before doing so wrote a letter of May 15 to the defendant in which he demanded the return of the 111*l*. 1*s*. 2*d*. paid for rent, stating: "This was paid on the strength of "your representation that the offices had not been used for "residential purposes after December, 1938, and were free "to be used for the purpose for which they were let."

The proceedings of the committee on May 22 were recorded in a minute, from which it appeared that the defendant and the plaintiff were heard. The defendant did not dispute that the premises had been used residentially for eight months in 1939. The chairman stated that, owing to the size of the rooms on the ground and first floors, consent would be granted to their use for professional purposes, but that such a consent could not be given in respect of the other floors. As, however, the plaintiff had apparently made a bona fide error, the chairman said that it would not be the sub-committee's intention to enforce the regulation while the present occupants of the second and third floors remained, provided that the defendant endeavoured to re-allocate the accommodation on the ground and first floors so that the present non-residential tenants on the second and third floors might vacate their existing accommodation with a view to its early use for residential purposes. This undertaking was given; and accordingly it was resolved, first, that consent should be granted to the defendant for the use of the ground and first floors for professional offices; and, secondly, that no action should be taken to enforce the regulation in respect of the use for other than residential purposes of the second and third floors by the existing tenants.

The plaintiff and the defendant left the meeting together. The plaintiff said that his position must be considered, particularly with regard to his right to sublet since the indulgence offered by the committee presumably did not extend to subtenants. He repeated his demand for repayment of the rent, suggested that the parties might come to terms on the basis of no rent being paid until June 24, and indicated that on those terms he might be prepared to stay on. The defendant refused to allow any refund of rent, and a discussion took place about letting the first floor to the plaintiff.

On May 30 the defendant, who had not yet answered the plaintiff's letter of May 15, wrote: "I emphatically deny "that I made any representations as regards the user of the "premises, and as a matter of fact the question of the user "of the premises did not arise until after you had been in "possession of the premises and carried out alterations thereto "which must have been several weeks after April 10."

On June 7 the borough council granted the plaintiff a licence in respect of the electrical work, but a letter of July 21 from him to the town clerk attempting to ascertain what exactly were his rights, particularly with regard to subletting, drew only a non-committal reply. A discussion between the parties about office accommodation on the first floor came to nothing, and on July 29, 1947, the plaintiff stated his intention of starting proceedings. On May 21, 1947, he had issued a writ claiming repayment of 111*l.* 1*s.* 2*d.*, and he now caused it to be served. On September 29, as a matter of precaution, he gave notice to determine his tenancy, if it should be held to be valid, on March 31, 1948.

The plaintiff pleaded in his statement of claim that he had agreed to use the premises for professional purposes; that he was induced to enter into the agreement by representations made by the defendant that the premises had not been used for residential purposes since December 31, 1938; that those representations were untrue; that the agreement was therefore void for illegality by virtue of reg. 68 CA (1); alternatively, that the agreement was void on account of a mutual mistake of fact, or that the defendant was in breach of an implied term of the agreement that the premises could be used professionally.

The plaintiff claimed (1) the return of the 111*l.* 1*s.* 2*d.* as money had and received by the defendant to the use of the plaintiff, or, alternatively, the like sum as money paid for a consideration which had failed; (2) alternatively, the like sum as money paid under a mutual mistake of fact; (3) a declaration that the agreement was void; (4) alternatively, rescission of the agreement; (5) alternatively, 111*l.* 1*s.* 2*d.*, as damages for breach of contract.

The defendant denied making the representations alleged, and pleaded that the plaintiff had made alterations to the premises; that the borough council had given permission for the premises to be used otherwise than for residential purposes; and that the plaintiff was not entitled to the relief claimed. The defendant counterclaimed for rent, alleged failure by the plaintiff to keep the premises in repair as he had agreed to do by the agreement, and damages for negligence in removing a bath, by which the structure of the building was damaged.

The plaintiff in his reply denied liability as alleged in the counterclaim, and pleaded inter alia, that the bath was removed with the approval and concurrence of the defendant and that the damage (if any) was done by an independent contractor.

Lloyd-Jones K.C. and *R. J. Harvey* for the plaintiff.

W. R. Lawrence for the defendant.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

Oct. 12. DEVLIN J., [read a judgment in which, having recited the facts substantially as above set out, he continued :] I have now set out what I think are the essential facts. Many of them were the subject of conflicting evidence, and my statement of them shows that I have accepted the evidence of the plaintiff and his agents, and rejected that of the defendant. The cardinal point in the conflict turns on the representation about the use of the premises which the plaintiff alleges that the defendant made in March, 1947, and which the defendant denies making. I shall therefore state my reasons for preferring the plaintiff's evidence on this point. [His Lordship did so, and continued :] I am now in a position to consider the questions of law which arise, and I shall take, first, the issue of illegality. It is well settled that an agreement may be unenforceable either because on the face of it it cannot be performed without breaking the law, or because, although capable of being performed legally, it was made with the object of breaking the law. The statement of claim pleads ex facie illegality only; it contains no allegation about the object of the agreement, or about the state of mind of either party. I am bound to consider any sort of illegality, but I must first consider the case as pleaded.

In my judgment it fails. The regulation does not touch the letting of premises: it concerns only their use. The lease contains a covenant by the tenant to use the premises for professional purposes and not otherwise. Though positive in form, this is really a negative covenant; it should more correctly be phrased as a covenant not to use the premises otherwise than for professional purposes. Counsel for the plaintiff rightly concedes that it cannot be construed as imposing any obligation on the tenant to use the premises at all. The plaintiff can legally perform all his obligations under the agreement. He can get no benefit from it, because he could not, assuming the prohibition in the regulation to be absolute, enter into occupation; but that is immaterial. This is enough to dispose of the point. But, since the prohibition is not absolute, it is unnecessary to take quite such a legalistic view of the position. The regulation forbids non-residential user without the consent of the authority. There would be nothing remarkable in a man's taking a lease in this form if he had previously satisfied himself that consent would be granted, or if he were willing to take the risk of its refusal. The agreement would be ex facie illegal only if, expressly or impliedly, it required the tenant to enter into occupation without first obtaining consent to professional user.

Mr. Lloyd-Jones argues, alternatively, that, if the agreement could be performed lawfully, the covenant as to use is at least clear evidence that the parties contemplated an unlawful performance. That is to say, they contemplated that the premises should be used for professional purposes, and that would be unlawful use. The object of the agreement was therefore unlawful, and it is immaterial, counsel argues, whether the parties appreciated that their object was unlawful. Thus, he says, there is no need to investigate the state of mind of either the plaintiff or the defendant: he can establish that the agreement had an illegal object from the document itself and without going outside his pleading.

The fallacy in this argument is in the assertion that the covenant by itself shows that the parties contemplated an unlawful performance. It might, if the prohibition in the regulation were absolute; but, as I have pointed out, it is consistent with the hypothesis that the parties intended first to obtain the consent of the local authority. Whether or not they had such an intention can be shown only by extraneous evidence; the covenant by itself proves nothing. I am not accepting the view that, when the agreement is one which can be performed lawfully, it does not matter that the parties may not have intended to break the law if their object or intended mode of performance is in fact illegal. Such authority as there is suggests the contrary: see *Waugh* v. *Morris* (1). But I need not determine that point.

Before I consider the other issues raised on the pleadings it is convenient that I should complete what I have to say on illegality. I am satisfied that the defendant knew that his use of No. 9, Mansfield Street, was a breach of the law. Since he was using it illegally throughout 1946 without attempting to regularize his position by applying for the council's consent, I infer that he had no intention of making the application: doubtless he thought that the risk of refusal was greater than the risk of discovery. I am satisfied that when, at the end of 1946, he decided to sublet part of the premises for office accommodation, he did not intend that either he or the plaintiff should apply for the council's consent; if he had, he would not have deceived the plaintiff about the position. Accordingly, when he granted the tenancy, he expected and intended that the premises demised would be used by the tenant for an illegal purpose. It is, I suppose, notorious that a higher rent is obtainable for premises of this class if let for offices than if the user is restricted to dwelling.

The relevant principle of law is expressed by the Court of Appeal in *Alexander* v. *Rayson* (2) as follows: " But it often " happens that an agreement which in itself is not unlawful " is made with the intention of one or both parties to make " use of the subject matter for an unlawful purpose . . . . " In such a case any party to the agreement who had the " unlawful intention is precluded from suing upon it." Counsel for the defendant submits that I ought not in the circumstances of this case to apply that principle at all. Subject to this objection, which I shall consider later, he distinguishes it in three ways: first, he says that there is here no question of the defendant's himself using the demised premises illegally: the only person who could use them is the plaintiff. This is a distinction of form but not, I think, of substance. If both parties intend to use the subject-matter illegally, it is clear that the agreement is enforceable by neither. If one party intends to use the subject-matter illegally, it is clear that the agreement

(1) (1873) L. R. 8 Q. B. 202, 208.

(2) [1936] 1 K. B. 169, 182.

1949

EDLER
v.
AUERBACH.

Devlin J.

is not enforceable by him. If one party intends that the other should use the subject-matter illegally, I think that it is a logical and necessary extension of the principle that the agreement should be unenforceable by the first party. The plaintiff in this case is the innocent instrument through which the defendant sought to effect his intention that the law should be broken, and the defendant's position is, therefore, no better than if he were using the subject-matter himself.

Secondly, it is said that all that is shown against the defendant is an intention to break the law, and that that is not enough to attract the principle: see *Alexander* v. *Rayson* (1). I do not think that this is a case of mere intention. The granting of the lease which permitted only professional use was itself an overt step in carrying out the illegal intention which the defendant had already formed. Indeed, when the defendant, having deceived the plaintiff, had granted him the lease, there was nothing left for him to do: the breach of the law would follow naturally the steps which he had taken. There was more than an intent to break the law: there was an attempt to break it; and the fact that the attempt was frustrated because, before the premises were actually used, the borough council discovered the position is immaterial.

Thirdly, the defendant says that on May 22 the borough council consented, in effect if not in form, to the plaintiff's professional use of the premises, and that accordingly the lease can be enforced by the defendant after that date. I think that this plea fails. I doubt whether the borough council's resolution legalizes the professional use of the premises: but, assuming that it does, what has to be considered in the application of this principle is not whether the premises can legally be used for the purpose contemplated, but whether the defendant's conduct has been such as to disentitle him from obtaining the aid of the court to enforce the agreement to his own advantage. The agreement was part of the illegal scheme conceived by the defendant; it succeeded to this extent, as is clear from the minute of the meeting, that if the committee had not considered the plaintiff as being in actual occupation by reason of a bona fide error they would not have given him any relief. To allow the defendant to take advantage of a consent obtained in those circumstances would give him a profit from his own wrong. But in truth neither success

(1) [1936] 1 K. B. 169, 189.

nor failure of the scheme matters; neither would atone for the fact that it was conceived in wrongdoing. That is what matters, and what debars the defendant from invoking the aid of the court.

I turn now to the objection that I ought not to be considering any illegality except that which is pleaded. I accept the submission of counsel for the defendant that the illegality which I have found depends on the knowledge or intention of the defendant, that this is not pleaded, and that it ought to have been pleaded if it was to be relied on. Counsel then cited *North-Western Salt Company Ld.* v. *Electrolytic Alkali Company Ld.* (1). That case, I think, authorizes four propositions: first, that, where a contract is ex facie illegal, the court will not enforce it, whether the illegality is pleaded or not; secondly, that, where, as here, the contract is not ex facie illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, that, where unpleaded facts, which taken by themselves show an illegal object, have been revealed in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it; but, fourthly, that, where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not.

The last proposition is the most important for the purpose of this case, and I think that it fairly synthesizes the relevant dicta. The court must pronounce on the transaction if, in the words of Viscount Haldane L.-C. (2), the "case has been completely "presented," or, in Lord Moulton's words (3) "the contract "and its setting be fully before the court." What I have expressed as the third proposition is not so much an exception to the principle as an exemplification of it: the court must be satisfied of the illegality of the transaction; that means that it must be satisfied that it knows all the relevant facts. On any issue which is raised on the pleadings the court may safely assume that the relevant facts will be brought before it by one side or the other; where notice of the issue is not given on the pleadings, there is a danger that that assumption may break down, and the decision in *North-Western Salt*

(1) [1914] A. C. 461.
(2) Ibid, 469.
(3) Ibid. 476.

1949

EDLER
v.
AUERBACH.

Devlin J.

Company Ld. v. *Electrolytic Alkali Company Ld.* (1) is a warning against overlooking that danger. In *Rawlings* v. *General Trading Company* (2), Scrutton L.J. treated the decision as making it clear " that where all the facts are before the court, " and it can see clearly that it is contrary to public policy to " enforce the agreement, the court should act, though the " pleadings do not raise the point." This dictum is in a dissenting judgment; but the point of dissent was whether the agreement in that case was in restraint of trade or not.

I must now apply these propositions to the circumstances of this case. The plaintiff called the defendant's agent, and the only point of his evidence was to establish that the defendant at all material times knew quite well that the premises were subject to the regulation. Fraudulent misrepresentation is not pleaded: the only issue in the statement of claim to which the defendant's state of mind might relate is mutual mistake, and the agent's evidence was inconsistent with the plea on that point. Nevertheless, his evidence was taken without objection; I think that, if objection had been made, I should have upheld it. It was not until after his evidence, including cross-examination, had been completed that it was submitted for the defendant that it ought not to have been received and that I ought to disregard it. That is in effect inviting me to ignore an illegality that has been brought to my attention. I cannot do that. When the court comes to know of an illegality, public policy requires that it should refuse any help to the wrongdoer; and public policy cannot be circumvented by the court's fictitiously deeming itself not to have heard that which in truth it has heard. Things might be different if the illegality depended on evidence received after an objection made in time had been wrongly overruled; but I have not to consider that.

If the matter had been left there, I might, applying the third of the propositions expressed above, have concluded that I had heard only one side of the case and have refused to act upon the agent's evidence, even though unchallenged. But the defendant went into the box and dealt fully with the point. I am satisfied that I have all the relevant material before me; indeed, it was not suggested that I had not or that there was any aspect of the point insufficiently exposed. I am satisfied that the evidence leads clearly and inevitably to the inferences which I have set out above, and that I must refuse to allow the defendant to enforce the tenancy agreement.

(1) [1914] A. C. 461.

(2) [1921] 1 K. B. 635, 645.

Accordingly, the counterclaim, in so far as it consists of a claim for rent, fails, as it would have failed in *Alexander* v. *Rayson* (1), had it been pursued. Similarly, the other claim in the counterclaim for alleged failure to repair, which depends on the terms of the lease, must fail. It is agreed, and I hold, that the claim for compensation for damage done to the structure of the building during the removal of the bath, arises independently of the lease. The issues raised by that claim and the corresponding paragraph in the plaintiff's reply will be referred to an official referee for determination.

The illegality does not affect the validity of the lease: see *Alexander* v. *Rayson* (2), and so the prayer in the statement of claim for a declaration that the lease is void fails. Prima facie the rent, which the plaintiff is seeking to recover, was properly paid under a valid agreement, and the defendant is entitled to retain it: see *Alexander* v. *Rayson* (1). The defendant's illegality prevents him from enforcing his rights under the lease, but does not by itself give any right of action to the plaintiff. If the plaintiff is to sustain his claim he must show a good cause of action entitling him to repayment of the money either as a liquidated sum or by way of damages or equitable relief based on rescission or otherwise; and I must therefore resume consideration of the causes of action pleaded in the statement of claim.

I take, first, misrepresentation about the use of the premises in 1939. I find the misrepresentation proved, but it is pleaded only as innocent misrepresentation and can therefore lead only to the remedy of rescission. *Angel* v. *Jay* (3) clearly decides that innocent misrepresentation is not a ground for the rescission of an executed lease. I treat that decision as binding upon me, and so need not consider the effect of the plaintiff's acts after the lease was executed, or indeed after May 15 when he discovered the truth. This claim fails. Mutual mistake of fact about the user of the premises fails also, because on the facts which I have found the mistake was not mutual.

The statement of claim next pleads an implied warranty that the plaintiff could use the premises for professional purposes. The relevant principle of law was enunciated by Parke B. in *Hart* v. *Windsor* (4), and quoted with approval by Scrutton L.J. in *Bottomley* v. *Bannister* (5), and is as follows:

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(1) [1936] 1 K. B. 169.
(2) Ibid. 184.
(3) [1911] 1 K. B. 666.
(4) (1843) 12 M. & W. 68, 87.
(5) [1932] 1 K. B. 458, 468.

1949

EDLER
v.
AUERBACH.

Devlin J.

"There is no contract, still less a condition, implied by law "on the demise of real property only, that it is fit for the "purpose for which it is let." This principle has often been applied in cases where the premises are physically unfit for the purpose. I think it equally applicable where premises are, so to speak, legally unfit. "It is the business of the tenant, if he does not protect himself by an express warranty, to satisfy himself that the premises are fit for the purpose for which he wants to use them, whether that fitness depends upon the state of their structure, the state of the law, or any other relevant circumstances."

Even if in the ordinary case of this type the law implied a warranty, it must still remain true that it is based on the presumed intention of the parties. Where, as in this case, the point is expressly canvassed and a specific representation is made during the negotiations leading to the agreement, it seems to me that the plaintiff's case must be an express collateral warranty or nothing. If the representation is made with the intention that it should be a warranty, it will be one; if it was made without such an intention, how is the intention, which is necessary for implied warranty, to be presumed? The refusal of an express warranty would clearly negative any implication; I think that what I might call the withholding of it must have the same effect. No express warranty is pleaded here, doubtless because the plaintiff did not regard the statement as a warranty; if he had, it would be difficult to explain how as a solicitor with a knowledge of these distinctions, he did not ask for it to be incorporated in the draft agreement which he was then considering. In my opinion the plea of implied warranty fails.

I take next the plea that the money was paid for a consideration that has failed. The money was paid because it was due under a valid lease, by which an estate passed to the plaintiff. The defendant has not broken or repudiated any covenant in the lease. The plaintiff, once implied warranty is negatived, has obtained all that he bargained for. He may have derived no benefit from the consideration which he obtained, but that is not the same thing as failing to get it.

Next, there is a plea that the money was paid under a mistake of fact. This is pleaded sufficiently widely in the writ, but in the prayer of the statement of claim it is restricted to mutual mistake. During the trial I permitted an amendment to the statement of claim to enable the plaintiff to rely

1949

EDLER
v.
AUERBACH.

Devlin J.

on unilateral mistake. The mistake relied upon is the plaintiff's mistake in supposing that the premises had not been used for residential purposes since December 31, 1938. I think that the plaintiff made this mistake, but I do not think that he paid the money because of it. The effect of the mistake was exhausted when the lease was made, and the plaintiff made the payment because the lease compelled him to do so. The lease could be rescinded only if the mistake was mutual. Presumably the plaintiff would not contend, leaving illegality, which is irrelevant on this point, on one side, that he could escape payment of rent and at the same time hold the defendant to his obligations under the lease. But if the tenant is released from paying rent and the landlord released from his obligations, it would amount to a rescission of the lease on the ground of unilateral mistake.

If the plaintiff had known from the start the facts showing illegality, he could have resisted the first payment of rent on the same ground as that on which the counterclaim has been dismissed. It may at first sight seem odd that he should not now be allowed to recover it. It may be that if the plaintiff had pleaded that he made the payment under the mistaken belief that the lease was enforceable by the defendant he could have recovered it. I do not have to consider this point. It is not the mistake pleaded; and if the necessary amendment had been asked for I should not have allowed it. The facts necessary to support it would have involved the allegation that the defendant at the material time knew of the 1939 residence and was engaged in a deliberate attempt to defeat the law. The allegation of knowledge would almost inevitably have turned the plea of innocent misrepresentation into one of fraudulent misrepresentation. It is one of the unfortunate aspects of this case that I have been compelled, as I think, on grounds of public policy to give effect to what is tantamount to a finding of fraud against the defendant although fraud is not pleaded. In so doing I must be careful to limit myself to that which public policy requires, namely, the denial of relief to the defendant. In the matter of the relief to be granted to the plaintiff, he must be held most strictly to his pleading.

This last point is relevant also to the final plea raised by the plaintiff. This is the action of money had and received, which his counsel invoked in wide terms, pleading that the defendant had been unjustly enriched and that it would be unconscientious of him to retain the money. Counsel

1949

EDLER v. AUERBACH.

Devlin J.

relied on a passage in Lord Wright's speech in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Limited* (1). I am not going to explore the boundaries of the action for money had and received. I do not think that any question of injustice or unconscientiousness arises in this case, or that the law need fear any reproach if it refuses relief. The plaintiff can legitimately complain that he was misled by the defendant: that is his real grievance. It was open to him to allege and, if he could, to prove that the defendant had acted fraudulently; and, if he had proved it, the law would have granted him a remedy. Since he does not allege it, it would be unjust to the defendant to assume that he acted otherwise than innocently. It is never easy to decide which of two innocent men should bear a loss that has fallen upon them both; for it must be remembered that, while the plaintiff has paid his rent without benefit to himself, the defendant, if the rent were repaid, would have given up, without any return, the use of his premises from the beginning of the lease until the plaintiff elected to claim relief. It would be inequitable, therefore, to grant the plaintiff unconditional relief. Equity will grant relief, but only upon terms as to restitution with which in this case the plaintiff cannot comply. The last plea of the plaintiff's is in reality therefore only a plea that the well-settled principles upon which relief is granted for innocent misrepresentation should be overturned; and as such it must fail.

There will be judgment for the defendant on the claim and, save as to the matter of the bath, for the plaintiff on the counterclaim.

Judgment for the defendant on claim and for the plaintiff on counterclaim.

Solicitors for the plaintiff: *R. Edler & Co.*
Solicitors for the defendant: *Norman Hart and Mitchell.*

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(1) [1943] A. C. 32, 64.

R. C. C.

STANDINGFORD *v.* PROBERT.

C. A.

1949
Nov. 4.

Evershed M.R.
Cohen and
Asquith L.JJ.

Landlord and tenant—Rent restriction—"Suitable alternative accommodation"—"Needs of the tenant and his family"—Whether tenant's married sons and their wives members of her family—Position of lodger—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3.

The defendant was tenant of a dwelling-house, subject to the provisions of the Rent Restriction Acts, which consisted of three bedrooms, two living rooms, a kitchenette and bathroom. She had living with her a daughter, two married sons (one of whom, being tubercular, had to have a bedroom alone) and their respective wives, and also a lodger. The landlord, having given notice to quit, offered to the tenant as alternative accommodation a flat comprising two bedrooms, one living room, a kitchenette and bathroom, and also two bedrooms in other premises. The county court judge made an order for possession, holding that the flat alone offered by the landlord was "suitable alternative "accommodation" within s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, as, in determining in accordance with the provisions of sub-s. 3 of s. 3 whether the alternative accommodation offered was "reasonably suitable "to the needs of the tenant and his family" only the tenant and her daughter had to be considered, since the two married sons and their wives were not members of the tenant's family for the purpose of s. 3, sub-s. 3.

Held, that the tenant's two sons and their wives were members of the tenant's family and the alternative accommodation offered by the landlord was accordingly not suitable. In considering whether relatives were "members of the tenant's "family" within s. 3, sub-s. 3, of the Act of 1933 the test was whether an ordinary man, were he asked if the relations in question living with the tenant were members of her family, would answer—"yes." If he would, such relatives should be treated as part of the family for the purposes of s. 3, sub-s. 3. Relatives must be "permanently" residing with the tenant to be members of the family for the purposes of s. 3, sub-s. 3. It was not, however, necessary that they should intend to live with the tenant for the rest of their lives.

Price v. *Gould* (1930) 143 L. T. 333; *Brock* v. *Wollams* [1949] 2 K.B. 388, considered.

Quaere, whether, when a tenant's family included married children, it would ever be possible for two separate dwelling-houses to constitute "suitable alternative accommodation" within s. 3, sub-s. 3, having regard to the decision in *Sheehan* v. *Cutler* [1946] K. B. 339.

The question whether a lodger is a member of a tenant's family for the purpose of s. 3, sub-s. 3, also considered.

APPEAL from Windsor county court.

The defendant, Mrs. F. C. Probert, had been tenant of No. 12 Westcroft, Slough, since 1937. The premises comprised three bedrooms, two living rooms, a kitchenette and bathroom. The tenant had living with her, her daughter Elsie whose husband had deserted her, her son and his wife, a second son and his wife, and a lodger. The first son and his wife had lived with his mother in the premises since before the war, and while he was away on war service he had continued to pay rent for his room. The other son and his wife had lived with his mother since he had been invalided out of the Army in 1946. The premises were occupied by the tenant and her family as follows: the tenant, her daughter, and one son's wife occupied one bedroom; that son, who was tubercular, occupied another bedroom alone; the lodger occupied the third bedroom; and the other son and his wife occupied one of the living rooms which had been turned into a bedroom.

The plaintiff, James Frederick Standingford, had purchased No. 12 Westcroft, in 1948. He was living with his wife and two little girls, aged 4 and 3 years, in a flat No. 76 Northcroft, Slough, which consisted of two bedrooms, one living room, a kitchenette, and bathroom. One of the little girls was more or less paralysed, and her mother, who had had an operation, found it difficult to carry her up and down stairs. The landlord served on the tenant notice to quit, offering to the tenant No. 76 Northcroft, as alternative accommodation. He also offered the tenant two bedrooms in No. 12 Westcroft.

The deputy county court judge made an order for possession, holding that No. 12 Westcroft was of itself suitable alternative accommodation for the tenant and her family for the purpose of s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (1). The tenant's family for the

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(1) The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, sub-s. 1: "No order or judgment for the "recovery of possession of any "dwelling-house to which the "principal Acts apply or for the "ejectment of a tenant therefrom "shall be made or given unless "the court considers it reasonable "to make such an order or give "such a judgment, and either— "(*a*) the court has power so to "do under the provisions set out "in the First Schedule to this "Act; or (*b*) the court is "satisfied that suitable alternative "accommodation is available for "the tenant or will be available "for him when the order or "judgment takes effect."

Sub-section 2: A certificate

C. A.
1949

STANDINGFORD
v.
PROBERT.

purpose of the section, he thought, consisted of herself and her daughter, the two sons and their wives not being members of her family but constituting two independent families.

The tenant appealed.

R. G. Dow for the tenant. There is no authority on the meaning of the word " family " in s. 3, sub-s. 3 of the Act of 1933. There have, however, been decisions on the meaning of family in s. 12, sub-s. 1 (*g*) of the Act of 1920. It would seem that the word " family " when used in s. 3, sub-s. 3 of the Act of 1933 has a wider meaning than when used in s. 12, sub-s. 1 (*g*) of the Act of 1920, and the authorities explaining the meaning of the word in the latter section would also apply to the former. It has been held in connexion with s. 12, sub-s. 1 (*g*) that " family " includes brothers and sisters, and also an adopted daughter. [He referred to *Salter* v. *Lask* (*No.* 2) (1), *Price* v. *Gould* (2), *Brock* v. *Wollams* (3).] It is an artificial distinction to hold that married sons cease to be members of their parent's family. *Sheehan* v. *Cutler* (4) established

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" of the housing authority for the area in which the said dwelling-house is situated, certifying that the authority will provide suitable alternative accommodation for the tenant by a date specified in the certificate shall be conclusive evidence that suitable alternative accommodation will be available for him by that date."

Sub-section 3: " Where no such certificate as aforesaid is produced to the court, accommodation shall be deemed to be suitable if it consists either—

" (*a*) of a dwelling-house to which the principal Acts apply; or

" (*b*) of premises to be let as a separate dwelling on terms which will, in the opinion of the court, afford to the tenant security of tenure reasonably equivalent to the security afforded by the principal Acts in the case of a dwelling-house to which those Acts apply,

" and is, in the opinion of the court, reasonably suitable to the needs of the tenant and his family as regards proximity to place of work, and either—

" (i) similar as regards rental and extent to the accommodation afforded by dwelling-houses provided in the neighbourhood by any housing authority for persons whose needs as regards extent are, in the opinion of the court, similar to those of the tenant and his family; or

" (ii) otherwise reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent and character."

(1) [1925] 1 K. B. 584.

(2) (1930) 143 L. T. 333.

(3) [1949] 2 K.B. 388

(4) [1946] K. B. 339.

that the offer of alternative accommodation in two separate houses is not enough. The fact that the tenant's family includes married children does not make such a provision suitable accommodation for the purposes of s. 3, sub-s. 3. The object of that section is to assure that the family shall be rehoused as a unit.

Comyn for the landlord. First, it is not enough for a tenant to show that members of his family are living with him: he must show that they are living with him "permanently." Here the tenant has not shown that these married sons are living with her permanently. Secondly, it is submitted that, on the true construction of s. 3, it is not essential that the alternative accommodation should be suitable for the tenant and his family. This requirement is only one element in deciding whether the alternative accommodation is suitable. The section does not state that alternative accommodation shall not be deemed to be reasonable *unless* it is suitable to the needs of the tenant and his family. It is significant that "family" is not mentioned in sub-ss. 1 and 2 of s. 3. Thirdly, it is submitted that these sons are not members of the tenant's family. When a son marries he becomes the head of a new family. The object of sub-s. 3 is to give protection for a tenant and the members of his family for whom he should provide. A tenant is not bound to provide a home for married children. The subsection is not intended to protect all the tenant's family. Its application is limited to members of the family for whom the tenant is under a legal obligation to provide accommodation. These married sons were not members of this tenant's family. If that contention is wrong, it is submitted that the case should be remitted for a new trial, as the landlord has offered, in addition to the flat, two rooms in No. 12 Westcroft. The principle laid down in *Sheehan* v. *Cutler* (1) does not apply to the case where the tenant's family includes sub-families which can reasonably be housed in a separate dwelling-house.

COHEN L.J. The landlord bought the house after the date material for the purposes of sch. I. to the Act of 1933—that is, after December 6, 1937, so that he could only succeed if he could bring himself within the terms of s. 3, sub-s. 1, of the Act of 1933.

(1) [1946] K. B. 339.

C. A.
1949
Standingford v. Probert.
Cohen L.J.

The first question that arose for the deputy county court judge's consideration was whether or not all the occupants of 12 Westcroft were persons who were within the description, "the tenant and his family." In saying that that was the first question that the county court judge had to consider, I have not overlooked the fact that Mr. Comyn has made a submission that sub-s. 3 does not lay down conditions which have to be satisfied in order that the accommodation should be suitable, but merely affords a guide as to what would normally be suitable. I do not know whether that point was or was not taken before the deputy judge. If it was, he did not find it necessary to consider it. I will discuss it later. The judgment of the deputy judge reads as follows: "In this case the question of hardship is irrelevant. "I hold that the defendant's family for the purposes of s. 3 "comprises the defendant and her separated daughter Elsie, "the two married sons and their wives being excluded for that "purpose. I hold that the accommodation offered at No. 76 "Northcroft is alternative accommodation within the meaning "of the Rent Acts sufficient for the defendant's family so "constituted and I further hold the same to be sufficient "alternative accommodation within that section should it "be that the defendant's family also includes the lodger "Rennell."

If he was right in those conclusions, I think it plain that there was evidence on which he could find that it was reasonable to make the order that he made; but the first question to be considered is: was he right in excluding the two married sons and their wives from the description, "the tenant and his "family"? There is no reported decision on this sub-section as to the meaning of those words, but the question of the meaning of "family" has come up for consideration in connexion with s. 12, sub-s. 1 (*g*) of the Act of 1920, which is a definition clause and defines the expression "tenant" as including "the widow of a tenant who was residing with him "at the time of his death, or, where a tenant leaves no widow "or is a woman, such member of the tenant's family so residing "as aforesaid"—that is, residing with the tenant—"as may "be decided in default of agreement by the "county court." In that connexion the meaning of "family" has come up for consideration in a number of cases, and it has been held that blood relations, at any rate, as distant as nephews and nieces also adopted children, are within the meaning of the

C. A.

1949

STANDINGFORD v. PROBERT.

Cohen L.J.

sub-section, provided, of course, that they satisfy the conditions of residence.

It is true that we are now considering a different sub-section, but observations have been made in the course of judgments on s. 12, sub-s. 1 (*g*), which are of assistance to us in reaching a conclusion as to the meaning of the word " family " in s. 3, sub-s. 3 of the Act of 1937. The first case to which I would refer is *Price* v. *Gould* (1). That case was cited by Bucknill L.J. in *Brock* v. *Wollams* (2), where the passage to which I wish to refer is sufficiently set out. He cites Wright J. as saying (3): " ' It has been said in a number of equity cases, " ' relating principally to wills or to settlements under powers " ' of appointment, that the word " family " is a popular, " ' loose, and flexible expression, and not a technical term. " ' It has been laid down that the primary meaning of the " ' word " family " is children, but that primary meaning is " ' clearly susceptible of wider interpretation, because the " ' cases decide that the exact scope of the word must depend " ' on the context and the other provisions of the will or deed " ' in view of the surrounding circumstances. Thus, in *Snow* " ' v. *Teed* (4) it was held that the word " family " could be " ' extended beyond not merely children but even beyond the " ' statutory next-of-kin.' Wright J. went on to say (5): " ' I hold that in the section now under consideration ' "—that is s. 12, sub-s. 1 (*g*)—" ' the word " family " includes brothers " ' and sisters of the deceased living with her at the time of her " ' death. I think that that meaning is required by the ordinary " ' acceptation of the word in this connexion, and that the " ' legislature has used the word " family " to introduce a flexible " ' and wide term.' "

I was a member of the court which decided *Brock* v. *Wollams* (6), and said this: " Counsel for the landlords " submitted that there were only two possible meanings of the " word ' family ' in s. 12 subs. 1 (*g*) of the Act of 1920 " The first meaning he suggested was ' relations by blood or " ' marriage ' and the second ' household,' including all living " on the premises, relatives, servants and lodgers. He " excluded and, I think, rightly excluded, the second " sense. I do not think it can have been the intention of the " legislature to protect servants and lodgers, but I am not

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(1) 143 L. T. 333.
(2) [1949] 2 K. B. 388, 393.
(3) 143 L. T. 334.
(4) (1870) L. R. 9 Eq. 622.
(5) 143 L. T. 334.
(6) [1949] 2 K. B. 388, 394.

"prepared to hold that the two meanings suggested by counsel "for the landlords are exhaustive. I think that there is "a third meaning. I respectfully agree with what was said "by Wright J. in *Price* v. *Gould* (1) in the passage which my "Lord has already read. The question the learned "county court judge should have asked himself was: Would "an ordinary man, addressing his mind to the question whether "Mrs. Wollams was a member of the family or not, have "answered 'Yes' or 'No'?"

I think that that is a fair test to apply when considering the meaning of the words, "the tenant and his family" in s. 3 of the Act of 1933 for the purposes with which we are now concerned. Obviously, having regard to the subject-matter, no member of the family who is not permanently living—I will use that expression for the moment, though it is not entirely accurate—with the tenant would fall within the meaning of the word "family"; but, subject to fulfilling the conditions of residence, I think that the proper question to ask oneself is this: if an ordinary man were told that this tenant had living with her the relations of whom we know, would he or would he not have said, "those are the members of her family?" If he would—and I think that he would answer that question in the affirmative—I see no reason why they should not be treated as "family" for the purposes of s. 3.

I said, "permanently residing." By that I do not mean, as Mr. Comyn asked us to say, that they intended to live there for the rest of their lives. I think that a fair test would be this: supposing anybody said to a married son, "have you "made your home with your mother or are you just staying "with her temporarily?," would he or would he not reply, "I am making my home with her and I have no present "intention of making any change?" If he would answer in that way, as I think the sons plainly would in this case, then it seems to me that the only proper course in the absence of other relevant circumstances is to treat them and their wives as members of the family.

Mr. Comyn asked us to say that this was a question of fact, and so in part it is; but I am satisfied that the county court judge did not direct himself properly in applying his mind to this question. I think it plain from the form of his judgment that he accepted Mr. Comyn's argument, which I do not accept, that once the sons are married they must be

(1) 143 L. T. 333.

C. A.

1949

STANDINGFORD v. PROBERT.

Cohen L.J.

treated as having set up a separate family and must be excluded from the expression "family" when we are considering the application of this section.

For these reasons I think that the deputy judge answered the question wrongly when he came to the conclusion that the sons should be excluded from the family. I think it plain from his judgment that, had he given what I consider to be the correct answer to the question, he would have refused to make the order for possession. Mr. Comyn, however, asks us to take a different view and to say that even on this view the landlord offered adequate alternative accommodation because, in addition to 76 Northcroft, he had also offered two rooms and a bathroom in the house 12 Westcroft, which the landlord would have been taking over.

I very much doubt whether it is open to us to accept that argument because of the decision of this court in *Sheehan* v. *Cutler* (1), where this court had to consider the meaning of "suitable alternative accommodation available for the "tenant," within the meaning of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The facts in that case were not identical with those here, but in the course of his judgment, Morton L.J. said (2): "It seems to "me that in this subsection the legislature is regarding the "tenant and his family as one unit and is providing that that "unit is to be accommodated in one dwelling-house under "sub-cl. (*a*) or in premises to be let as one separate dwelling "on terms which answer the description given in sub-cl. (*b*). "The provisions which follow, and in particular the provisions "of sub-cl. (ii) in reference to 'the needs of the tenant "'and his family' in regard to the extent and character of "the accommodation, point in the same direction."

I appreciate that there is much force in what Mr. Comyn in his able argument said as to the disadvantages of applying that ruling literally in a case where there are, so to speak, two sub-families in the one family living in the premises. In such a case it would obviously be quite convenient—as on the facts of this case it would have been quite convenient—if the landlord had been in a position to offer a separate flat to one son and his wife. I do not, however, think it is necessary for us to decide whether we are bound by the decision in *Sheehan* v. *Cutler* (1) to hold that in no case can two dwelling-houses constitute a separate dwelling-house within the meaning of

(1) [1946] K. B. 339. (2) Ibid.

sub-s. 3, since I think that, even if it were possible to treat two dwelling-houses as complying with the obligations to provide suitable alternative accommodation, on the facts of this case, these two rooms, having regard to the family and the illness of one of the sons and so on, could not possibly constitute adequate alternative accommodation.

What I have said would, I think, be enough to dispose of this case, but there are two other matters to which I think I should refer. The first is the question of the lodger. The deputy judge seems to have thought that the lodger could be treated as a member of the family. I do not think it necessary to decide whether he was right. The question whether or not a lodger should be included in the "family" may well depend on all the circumstances of the particular case.

The other point with which I want to deal is the argument addressed to us by Mr. Comyn that s. 3, sub-s. 3, is not exhaustive but is merely indicative, and that it was open to the deputy judge to make an order for possession even though the conditions laid down in the sub-section were not complied with. He relied, in support of this argument, on the language of sub-s. 2, which provides that the certificate of the housing authority is conclusive on the question whether suitable alternative accommodation will be available for the tenant. I think that Mr. Comyn was right in saying that, if that certificate were given, the only way in which the court could pay any attention to other members of the family would be under the provisions as to reasonableness. But I am not by any means satisfied that the housing authority would ignore s. 3 in considering the question whether they should or should not give the certificate which the tenant sought to obtain. Be that as it may, I am unable to read sub-s. 3 in the limited sense in which Mr. Comyn asks us to read it. I think that it has always been treated in this court as laying down the conditions which must be satisfied if the provisions as to alternative accommodation in sub-s. 1 are to be fulfilled, and I gather that hitherto nobody has even sought to argue the point which Mr. Comyn has boldly undertaken to argue in the present case. In my view the assumption which the parties made in the earlier cases was well founded.

For these reasons I would allow the appeal.

ASQUITH L.J. I agree, and would only add two sentences. On the main point Mr. Comyn relied strongly on the fact that, on marrying, a son becomes the head of a new family. It does not follow that on marrying he ceases to be a member of the original family. Nothing short of that will avail the landlord. And this seems to me no more to follow from Mr. Comyn's premiss than it follows, as I ventured to point out in the argument, from the fact that a man on marrying becomes his wife's husband that he ceases to be his mother's son. One can be a member of two families simultaneously. That is a circumstance which, I think, is fatal to Mr. Comyn's main argument; and I agree that the appeal should be allowed.

EVERSHED M.R. I also agree. Although we are differing from the deputy county court judge's opinion, I should, I think, be guilty of mere repetition if I traversed again the arguments and matters fully discussed by my brethren, with whose judgments I find myself in entire agreement. As regards the question whether, on the footing that the family here does include the sons, it might have been a sufficient provision on the landlord's part to have offered accommodation not all under one roof or forming part of one physical unit, I am inclined to think that, as Cohen L.J. has said, the matter may be governed by the decision of this court in *Sheehan* v. *Cutler* (1). I wish however to leave open that question. It may be that such a requirement is not always and for all purposes sensible or necessary.

However that may be, I think, on the facts in this case, that, once the view is taken that the unit (to use the phrase of Morton L.J. in *Sheehan* v. *Cutler* (1)) comprehends here all the children and, in the case of two of them, their wives, it inevitably follows from the judge's own reasoning in his judgment that he would not have held, as we do not hold, that the accommodation offered here was suitable.

I agree, therefore, that the appeal should be allowed, with the result that the order made is discharged and no order is made for possession. The action will be dismissed.

Appeal allowed.

Solicitors: *Amery-Parkes & Co.* for *Willmett & Co., Slough*; *W. Timothy Donovan.*

B. A. B.

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(1) [1946] K. B. 339.

ATTORNEY-GENERAL *v.* LONDON STADIUMS LD.

C. A.

1949
Nov. 17.

Tucker, Singleton and Jenkins L.JJ.

Revenue—Stamp duty—Exemption—Amalgamation of companies—Shares issued by transferee company to existing companies—Exemption dependent on retention of " the shares so issued "—Sale of some of the shares—Effect on exemption—Finance Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 55, *sub-s.* 6 (*b*).

By s. 55, sub-s. 1, of the Finance Act, 1927, exemption from stamp duty is granted where a transferee company acquires the undertaking of an existing company in connexion with a scheme of amalgamation, but sub-s. 6 (*b*) provides that if, where shares in the transferee company have been issued to the existing company in consideration of such an acquisition, the existing company ceases, within two years, to be the beneficial owner of the shares so issued to it, an amount equal to the duty remitted shall be recoverable from the transferee company.

The purpose of s. 55 is to preserve for a period of two years the position which comes into existence at the time when the exemption is granted; and the duty remitted accordingly becomes payable as soon as the existing company ceases to be the beneficial owner of any of the shares.

Decision of Lord Goddard C.J., ante, p. 72, affirmed.

APPEAL from Lord Goddard C.J.

London Stadiums, Ld., the defendant company, was formed to acquire and amalgamate the undertakings of three companies owning greyhound racing tracks—Wandsworth Stadium Ld., Park Royal Stadium Ld., and Charlton Stadium (1936) Ld. On June 5, 1946, an agreement was entered into for bringing about the amalgamation. The capital of the defendant company was then substantially increased and fully-paid shares of 2*s*. each in that company were allotted proportionately to the three " existing " companies in consideration of the acquisition of their undertakings by the defendant company (the " transferee company "). On July 31, 1946, the agreement and declaration of trust were presented for adjudication of stamp duty to the Inland Revenue Commissioners, who granted relief from duty under s. 55, sub-s. 1, of the Finance Act, 1927, subject to sub-s. 6 of that section. On November 5, 1946, each of the three " existing " companies sold to a firm of stockbrokers a number of the shares allotted to them, and shortly afterwards the stockbrokers sold those shares to the public. In those circumstances an action was brought by the Attorney-General against London Stadiums Ld., the " transferee company," claiming to recover under sub-s. 6 (*b*) of s. 55 of the Finance Act, 1927 (1), an amount equal to the stamp duty previously remitted, with interest.

The preliminary issue of law whether the Crown's claim to repayment of duty was maintainable was decided by Lord Goddard C.J. in favour of the Crown (2). The defendant company now appealed, contending that sub-s. 6 (*b*) would only have applied if the "existing companies" had ceased to be the beneficial owners of all their shares. The definite article "the," preceding the plural noun "shares," prima facie meant, it was argued, "all the," and therefore the sub-section was inapplicable.

Millard Tucker K.C. and *John Clements* for the defendant ("transferee") company.

Pennycuick K.C. and *J. H. Stamp* for the Crown, were not called on to argue.

TUCKER L.J. [recited the facts, stated that the decision on the preliminary point of law would dispose of the issue between the parties save for questions of amount, and continued:] It is not disputed that all the requirements of s. 55, sub-s. 1 were fulfilled, so as to enable the defendant company to obtain the exemption of stamp duty which is therein granted, but the section goes on to provide that, notwithstanding that exemption, the "transferee" company may be required to repay the duty in respect of which exemption was obtained in certain circumstances. Those circumstances are set out in sub-s. 6, and it is with the language of that sub-section that this action is concerned. [His Lordship read the sub-section.]

By reason of the sale of the shares in the defendant

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(1) Section 55, sub-s. 1 of the Finance Act, 1927, grants exemption from stamp duty in certain circumstances where a "transferee "company" acquires the undertaking of an "existing "company" in connexion with a scheme of amalgamation. Sub-section 6 provides: "If . . . . "(*b*) where shares in the "transferee company have been "issued to the existing company "in consideration of the "acquisition, the existing comp-"any within a period of two years ". . . . ceases, otherwise than in "consequence of reconstruction, "amalgamation or liquidation, to "be the beneficial owner of the "shares so issued to it, ... "the exemption shall be deemed "not to have been allowed, and "an amount equal to the duty "remitted shall become payable "forthwith, and shall be "recoverable from the transferee "company as a debt due to "His Majesty, together with "interest thereon."

(2) Ante, p. 72.

"transferee" company by the three "existing" companies, which took place in November, 1946, and which represented, so far as the Wandsworth company were concerned, a sale of some 14 per cent. of its original 100 per cent. consideration, in the case of the Park Royal Company some 11 per cent., and in the case of the Charlton company some 15 per cent., it was contended on behalf of the Crown that the existing companies within a period of two years have ceased to be the beneficial owners of the shares so issued to them and that accordingly the Crown is entitled to the payment of duty remitted. The whole case turns upon the proper construction to be put on the words "beneficial owner of the shares so issued to it." It is said on behalf of the Crown that if the "existing" company ceases to be the beneficial owner of any single share forming part of the shares originally issued to it, the circumstances contemplated in the sub-section take effect and the duty is payable; and it contends that that is the natural and proper interpretation to be put on the words "the shares so issued "to it." On the other hand, it is contended by the defendant company that "the shares so issued" means the totality of the shares, and that therefore, so long as the "existing" company or companies retain one share out of those issued to them, the conditions prescribed by the sub-section for loss of the exemption are not fulfilled.

This is purely a question of the construction of the language of this particular sub-section. Although we have been quite properly referred to certain authorities, I can derive no assistance from them, with one possible exception, with regard to the interpretation of these words. We have, however, been reminded by Mr. Clements that in general terms the proper approach to questions of this kind has been stated on many occasions, and in particular was set out by Lord Haldane in *Lumsden* v. *Inland Revenue Commissioners* (1) He referred to certain passages in Lord Haldane's speech. At the beginning Lord Haldane said (2): "My Lords, this appeal raises a question of much difficulty which has been the subject of elaborate "argument at the Bar. But the real point lies within narrow "limits, and turns on the proper construction of a few words "in a statute, the Finance (1909-10) Act, 1910." Then, having previously said that the subject was so novel and so complicated that it was inevitable that questions should arise on which the meaning of the legislature had not been made

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(1) [1914] A. C. 877. (2) Ibid. 887.

C. A.

1949

ATTORNEY-GENERAL
v.
LONDON STADIUMS LD.

Tucker L.J.

wholly free from ambiguity, he proceeded: "The duty of "a court of construction in such cases is not to speculate on "what was likely to have been said if those who framed the "statute had thought of the point which has arisen; but, "recognizing that the words leave the intention obscure, to "construe them as they stand, with only such extraneous "light as is reflected from within the four corners of the "statute itself, read as a whole." Later on he said (1): "It is no doubt true that there are cases of construction where "the natural meaning of the words of a statute is rejected, "and another meaning not expressed by the words taken in "their ordinary sense is read in. That occurs where the "context and scheme of the statute requires that this should "be done in order that the language of the statute as a whole "may be read as consistent. But a mere conjecture that "Parliament entertained a purpose which, however natural, "has not been embodied in the words it has used if they be "literally interpreted is no sufficient reason for departing "from the literal interpretation." Then, finally, Lord Haldane said (2): "I said at the beginning that the duty of judges "in construing statutes is to adhere to the literal construction "unless the context renders it plain that such a construction "cannot be put on the words. This rule is especially important "in cases of statutes which impose taxation."

I take it that this is the manner in which we should approach the construction of this sub-section. As to that, I think that there can be no doubt whatever. But I go further and I am prepared to assume, without deciding, that in interpreting this sub-section we should apply the rule that where there is any real ambiguity in the meaning, this being a taxing statute, it should be resolved in favour of the taxpayer. I say that I am prepared to assume that without deciding it, because we have not thought it necessary to hear argument on behalf of the Crown, and it is a fact that this is a section concerned with the conditions which are required in order that a special exemption which has previously been given shall continue to avail the taxpayer who has received it. I am prepared to assume that those principles of construction should apply to a case of this kind; but that only arises if I should be of opinion that the language of the sub-section is ambiguous. I do not think that it is. I think the language in its context reasonably plain, and, without speculating as to the ultimate intentions of the legislature as to what it sought to achieve, that is, whether it sought to achieve a certain permanence of amalgamation or not, it seems to me really quite clear from the whole structure of the section that what it did intend to do, for whatever purpose, was to preserve the status quo in this matter, as it came into existence at the time when exemption was given, for the period of two years; and that, if there were any alteration in the status quo by reason that the beneficial ownership of any part of the shares issued ceased to remain in the "existing" companies, then the payment under sub-s. 6 should become exigible. To give the words any other meaning would render the whole of this part of the scheme—this sub-section, at any rate—purely nugatory. If, by retaining one share out of hundreds of thousands, possibly, of shares issued, the company could retain the benefit of that exemption, it is difficult to see what purpose could possibly have been achieved by the insertion of this sub-section.

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(1) [1914] A.C. 892.

(2) Ibid. 896.

It was pressed upon us by Mr. Tucker, on behalf of the company, that this is a case where there may have been a slip by the draftsman and that therefore the remedy of the Crown lies with Parliament and not with us. I do not so read these words. It is perfectly true that a pleader dealing with a matter of this kind, in order to make that which was clear, or tolerably clear, manifest beyond all dispute, might have used the words "or any of them;" but it seems to me that the words "the "shares so issued," having regard to the structure of the section as a whole, mean, and clearly mean, "the shares or "any of them." That is the view at which Lord Goddard C.J. arrived. He said (1): "I have simply to decide the true "construction of the words, 'ceases to be beneficial owner "'of the shares so issued to it.' It seems to me that s. 55 "concerns what may be called a genuine amalgamation of "companies. It contemplates that if a transferee company is to "have the very substantial benefit by way of relief from very "heavy stamp duty the existing company to which the shares are "transferred must keep those shares. The shares must be kept "and not marketed to the public or elsewhere for a period of at "least two years. The exemption granted by s. 55 meant to "facilitate not the creation of a market in shares, but what "may be called the genuine amalgamation of businesses "which are to remain amalgamated for at least two years." He added: "I think it is impossible to say that, where a person

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(1) Ante, p. 75.

C. A.

1949

ATTORNEY-GENERAL
v.
LONDON STADIUMS LD.

Tucker L.J.

"parts with some of the shares that have been issued to him, "he remains the beneficial owner of the shares so issued."

That that is the proper interpretation to be given to the language of this sub-section is further reinforced by something said by Lord Greene M.R., it is true only obiter, in *Lever Brothers Ld.* v. *Inland Revenue Commissioners* (1). He was there concerned not with para. (*b*) but with para. (*c*) of sub-s. 6, where exactly the same words occur, and this is what he said (2): "There is one other provision in the section which "appears to me to point strongly in the same direction. By "sub-s. 6 of the section provisions are put in for what I may, "for the sake of brevity, call ensuring some degree of permanence in the amalgamation which is to be carried through. "Obviously, the legislature would not be willing to grant "exemption from stamp duties unless it were in connexion "with something which was not merely in form an amalgamation, but an amalgamation which was not going to be put "an end to within a few weeks, or something of that kind, "by disposing of the shares which had been acquired. It "would have been a curious result if the benefit of a provision "which was obviously enacted to encourage, or at any rate, "to prevent discouragement of, amalgamaton, could be "obtained without ensuring that there should be an effective "amalgamation with, at any rate, some degree of permanence "in it. With a view to that, sub-s. 6 provides, among other "matters, that where the acquiring company has acquired "shares in the other company (if it is that type of amalgamation), then, if the shares are sold, or if any of the shares are "sold, or got rid of, within two years, the benefit of the "exemption which has been granted shall be taken back, and "the duty must be paid." He there uses the words, "the "shares, or if any of the shares are sold." In that passage, Lord Greene M.R., as indeed did Lord Goddard C.J. in this case, expressed the view that the object of the section was to achieve a certain permanence of amalgamation. It was argued by Mr. Tucker that a view of this legislation as a whole showed that that result did not necessarily follow. I express no view about that matter at all. There are those two very weighty expressions of opinion with regard to it. I express no view of my own on the matter. I think it sufficient to say that the intention of the legislature was to preserve the status quo for two years, whatever may have been the ultimate object aimed at.

(1) [1938] 2 K. B. 518. (2) Ibid. 527.

C. A.
1949
Attorney-General
v.
London Stadiums Ld.
Tucker L.J.

There is only one other matter to which I should refer before passing from this question, in justice to the argument of Mr Tucker. He emphasized the fact that in this para. (*b*) of sub-s. 6 occur the words " otherwise than in consequence of " reconstruction, amalgamation or liquidation," and he said that those three excepted methods or excepted operations which might result in a cesser of the beneficial ownership necessarily involved a 100 per cent. cesser. Be that as it may, in my view it is not sufficient to put a different meaning on the words which follow. The fact that in certain events the cesser may be a 100 per cent. one does not, in my view, prevent the sub-section from operating when in other circumstances the cesser is only partial. For these reasons, I think that this appeal fails.

Singleton L.J. : I agree.

Jenkins L.J. : I agree, and will add only a very few words on the construction of para. (*b*) sub-s. 6, of s. 55. For my part, I think that " the shares so issued to it " means " all " the shares so issued to it." Further, I think that " the " beneficial owner of the shares so issued to it " means " the " person who owns beneficially all the shares so issued to it." The company to which the shares in question were issued clearly ceases to be " the beneficial owner of all the shares so issued to it " when it parts with any of those shares. With respect to Mr. Tucker's argument, I think that it proceeds on a wrong construction, which consists of taking the words " ceases to be the " beneficial owner of " together and treating them, as it were, as a compound verb equivalent to " parts with the beneficial " ownership of." Of course, if those words are so construed, an ambiguity does result, but in my judgment there is no ground for so construing them. I think that, on the true construction of para. (*b*), the words " ceases to be " qualify the phrase " the beneficial owner of the shares so issued to it." The event referred to is the event of the " existing " company's ceasing to occupy the position of being the beneficial owner of, or, in other words, the person who owns beneficially, all the shares issued to it. Even if there be any ambiguity in the language of sub-s. 6 (*b*) taken by itself, I entirely agree with my Lord that, when the section is looked at as a whole, it is

C. A.

1949

ATTORNEY-GENERAL v. LONDON STADIUMS LD.

abundantly plain that the result must be as he has stated. I therefore agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker, Baker; Solicitor of Inland Revenue.*

A. W. G.

REX *v.* DICKSON.

C. C. A.

1949 *Oct.* 31.

Lord Goddard C.J., Hilbery and Lynskey J.

Criminal law—Sentence—Preventive detention and corrective training—Notice and proof of previous convictions—Procedure—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 21, 22, 23.

In cases where it is sought to impose on a prisoner a sentence of corrective training or preventive detention one of two courses should be taken concerning the notice required by s. 23, sub-s. 1, of the Criminal Justice Act, 1948, to be served on him: either an averment of the previous convictions which it is desired to prove should be put in the indictment, or the notice which is served on the prisoner should be attached to it.

The procedure which should be adopted by all courts in order to qualify a prisoner to receive one of these sentences is as follows: after a plea or verdict of guilty, a police officer should be called to prove that he served the notice on the prisoner at least three days before the trial; then the clerk of assize or of the peace should put the contents of the notice to the prisoner and obtain his admission or denial of the convictions in open court; finally, the prisoner or his counsel must be handed a copy of the Prison Commissioners' report.

APPEAL against sentence.

The appellant, Robert Dickson, was convicted at Bristol Assizes on his plea of guilty to receiving stolen property, breaking and entering, and stealing from the premises, and was sentenced to ten years' preventive detention. He had been served with notice of the three previous convictions which it was proposed to prove against him, and he signed an admission of the convictions at the end of the notice. At his trial no evidence was given that he had been served with the notice, his signature on the notice was not strictly proved, and he was not asked specifically whether he admitted the previous convictions; the judge merely asked a police officer whether the requirements of s. 21, sub-s. 5, of the Criminal

[Reported by Miss S. COBON, Barrister-at-Law.]

Justice Act, 1948 (1), had been observed and was told that the appellant had been served with a copy of the Prison Commissioners' report. The appeal was on the ground of alleged failure at the trial to carry out the requirements of s. 21.

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(1) Criminal Justice Act, 1948, s. 21, sub-s. 1: "Where a "person who is not less than "twenty-one years of age—

"(*a*) is convicted on indict-"ment of an offence punishable "with imprisonment for a term "of two years or more; and

"(*b*) has been convicted on "at least two previous occasions "since he attained the age of "seventeen of offences punish-"able on indictment with such "a sentence,

"then, if the court is satisfied that "it is expedient . . . . that he "should receive training of a "corrective character for a "substantial time, ... the "court may pass, in lieu of any "other sentence, a sentence of "corrective training . . . ."

Sub-section 2: "Where a "person who is not less than "thirty years of age—

"(*a*) is convicted on indict-"ment of an offence punishable "with imprisonment for a term "of two years or more; and

"(*b*) has been convicted on "indictment on at least three "previous occasions since he "attained the age of seventeen "of offences punishable on "indictment with such a "sentence, and was on at "least two of those occasions "sentenced to Borstal training, "imprisonment or corrective "training;

"then, if the court is satisfied "that it is expedient . . . . that "he should be detained in "custody for a substantial "time . . . . the court may pass, "in lieu of any other sentence, "a sentence of preventive "detention . . . ."

Sub-section 5: "A copy of any "report or representations in "writing made to the court by "the Prison Commissioners for "the purposes of" sub-s. 4 "shall be given by the court to "the offender or his counsel or "solicitor."

Section 22, sub-s. 1: "Where "a person is convicted on indict-"ment of an offence punishable "with imprisonment for a term "of two years or more and that "person—

"(*a*) has been convicted on "at least two previous "occasions of offences for which "he was sentenced to Borstal "training or imprisonment; or

"(*b*) has been previously "convicted of an offence for "which he was sentenced to "corrective training.

"The court, if it sentences "him to a term of imprison-"ment of twelve months or "more, shall, unless having "regard to the circumstances, "including the character of the "offender, it otherwise deter-"mines, order that he shall for "a period of twelve months "from his next discharge from "prison be subject to the pro-"visions of this section."

Section 23, sub-s. 1: "For the "purpose of determining whether "an offender is liable to be "sentenced to corrective training "or preventive detention or to "be ordered to be subject to the "provisions of the last foregoing

C. C. A.

1949

REX
v.
DICKSON.

James Burge for the appellant. There is no evidence that the notice of intention to prove previous convictions was served on the appellant, and the provisions of s. 23, sub-s. 1, have not been observed. It is not sufficient that there is a statement purporting to have been signed by him, as he was never asked in open court if he had made such a statement. In the absence of his admission of them the determination of his previous convictions should have been left to the jury: *Rex* v. *Browes* (1).

Fay for the Crown. There is certainly no evidence that the notice was served on the appellant; but, in spite of this irregularity, there is no substance in his appeal, and the sentence should stand: *Rex* v. *Davis* (2).

Burge replied.

LORD GODDARD C.J. The Criminal Justice Act, 1948, made several very definite changes in the criminal law. Penal servitude was abolished as a sentence because the discipline in prisons was no different whether the sentence was penal servitude or imprisonment. Therefore a sentence of imprisonment was substituted for all sentences which would have been either imprisonment, with or without hard labour, or penal servitude. Two new forms of sentence were provided. [His Lordship referred to s. 21, sub-ss. 1, 2, s. 22, sub-s. 1, and s. 23, sub-s. 1, and continued:]

It is true that s. 23 does not provide that the admission of previous convictions must be made in court. It contemplates a notice being served on the prisoner three days before the trial, and provides that, unless the convictions are admitted, the question must be determined by a jury. These provisions to some extent complicate what used to be the simple procedure of the court's sentencing a prisoner, and there are so many things now that have to be borne in mind that it is not surprising if, occasionally, some point is overlooked, or the court's mind is diverted from the really important thing so far as the prisoner is concerned, namely, the appropriate

"section, no account shall be "taken of any previous conviction "or sentence unless notice has "been given to the offender and "to the proper officer of the "court at least three days before "the trial that it is intended to "prove the conviction or "sentence; and unless any such "previous conviction or sentence "is admitted by the offender "the question shall be determined "by the verdict of a jury."

(1) [1949] W. N. 343.

(2) [1943] K. B. 274.

sentence to give him. It is, however, the duty of courts to follow strictly the procedure laid down.

The question which arises in this case is one of a highly technical nature. The appellant pleaded guilty to two offences of a very serious character. He is undoubtedly just the sort of man whose previous history indicates that he is a very proper subject for preventive detention, and for a long term of it.

The point taken on his behalf is that the prescribed procedure was not followed. [His Lordship stated the facts, and continued :] It has to be borne in mind that the court is directed by s. 21, sub-s. 4, before it sentences a prisoner to corrective training or preventive detention, to consider any report or representations which may be made to it by the Prison Commission on the defendant's physical and mental condition and suitability for such a sentence. It is not clear to me or, I think, to any of His Majesty's judges why it is necessary to serve that report on the prisoner (sub-s. 5). In some cases, I think, it may be very undesirable because it may give the prisoner ideas about his mental condition which, perhaps, he should not have. However, Parliament has made that provision, and it is for us to abide by it.

Three things, apparently, have to be done : (1.) proof of the notice ; (2.) proof of the admission by the prisoner, if he has admitted the convictions ; and (3.) the serving on him of the Prison Commissioners' report.

The court finds that the only thing that was said in court was that the Prison Commissioners' report had been served on the prisoner. The judge, no doubt having before him the statement which had been served on the prisoner regarding previous convictions and his signature at the bottom admitting them, probably thought that that was enough and forgot for the moment that, strictly speaking, it ought to have been proved that the signature on the notice was the prisoner's.

The court thinks that this is a good opportunity for stating what is the proper procedure to be adopted by all courts concerning proof of the matters necessary to qualify a prisoner to receive a sentence of corrective training or preventive detention. After a plea or verdict of guilty has been returned, a police officer should be called by counsel for the prosecution to prove that he served a notice on the prisoner, as provided by s. 23, sub-s. 1, three days before the trial. When that has been proved, the clerk of assize or the clerk of the peace, as the case may be, should then put the contents of that notice to the prisoner and obtain his admission or his denial of the convictions in open court: generally speaking, it will be an admission that he has had the previous convictions. Then the prisoner or his counsel must be handed a copy of the Prison Commissioners' report. The proceedings will then be in order.

It may happen that a prisoner, after signing the admission on the notice to which I have referred, when he comes into court, disputes one of the convictions and so wishes to withdraw his admission. In such a case, the trial judge will, no doubt, consider what is to be done, for this may happen on the last day of an assize. It appears to the court that the object of serving the prisoner with the notice three days before the trial is to give him an opportunity to say that he disputes a particular conviction. If he does so, the proper evidence can be obtained, that is, a copy of the conviction, and proof of identity by a police officer who can speak to the identity of the prisoner.

We do not say, and had better not say, as the question does not arise in this case, what is to happen if a prisoner seeks to withdraw an admission which he has previously made. But the procedure outlined above, namely, proof by the police that the notice has been served; the putting of the convictions contained in the notice to the prisoner and the obtaining of his admission or denial of those convictions; and, thirdly, the giving to the prisoner of the report of the Prison Commission, ought to be carried out in every case.

We feel obliged to set aside the sentence of preventive detention because we cannot find that the prisoner was ever asked in court whether he admitted the convictions or not; nor, indeed, was any evidence given that the notice had in fact been served. It is purely a technical point, because no one doubts that it was served and that he did admit the convictions. If, therefore, the sentence of preventive detention has to be set aside, the question is what sentence should be substituted for it. [His Lordship recited the appellant's history, and continued:] It is true that the appellant has not been arrested for any offence between July, 1947, which was about the time when he came out of prison, and the date of this offence. Preventive detention is meant to be imposed for a longer period than imprisonment. If the court is satisfied, for instance, that a sentence of five years' imprisonment is the right one, there is no point in giving five years' preventive detention. Indeed, preventive detention should only be given where the court is of opinion that a long period of detention is necessary. It is most unfortunate that we have felt obliged in this case, for the reasons given, to set aside this sentence of ten years' preventive detention ; but there must be a substantial sentence. The court has come to the conclusion that seven years' imprisonment must be substituted.

I would make one more observation on this somewhat troublesome matter of the procedure to be followed in these cases. The judges of the King's Bench Division, who form the judges of the Court of Criminal Appeal, have considered this matter, and—as I have notified clerks of assize and clerks of the peace—have come to the conclusion, because of the mistakes or omissions which have taken place in these cases, that it would be desirable, although it is not required by law, to put an averment in the indictment of these previous convictions so that the court's attention may be carefully directed to them. It has been pointed out to us, however, by various clerks of assize and clerks of the peace that that may cause difficulty because, especially at a heavy assize or heavy quarter sessions, it is not always known, when the indictments are drawn, that the police are going to put forward these previous convictions with a view to having the prisoner qualified for one of these new sentences.

The court is of opinion, therefore, that one of two courses can be taken : either an averment of previous convictions should be put in the indictment ; or the notice served on the prisoner should be attached to the indictment. That was done in this case, and has been done on other circuits and at other quarter sessions. That will constitute a sufficient record although it is still necessary for proof to be given that the notice was served. Above all, the convictions must be put to the prisoner in open court. In future, therefore, it will be open to clerks of assize and clerks of the peace either to include the averment in the indictment, or, if they find it more convenient, to attach the notice to the indictment. Thus, if the case comes up to this court we shall have copies of the notice before us.

Sentence of 10 *years' preventive detention set aside.*
Sentence of 7 *years' imprisonment substituted.*

Solicitors for the appellant : *Freeborough & Co.*
Solicitor for the Crown : *C. P. Brutton, Dorchester.*

C. A.

LAW *v.* DEARNLEY.

1949
Nov. 25;
Dec. 15, 16.

Tucker, Singleton and Jenkins L.JJ.

Gaming and wagering—Horse racing—Account stated—Bets placed by agent with bookmaker on behalf of principal—Losses paid by agent—Account sent by agent to principal and orally agreed by him—Default by principal—Action by agent against principal on account stated—R. S. C. 1883 *Or.* 25, *r.* 4—*Gaming Act,* 1892 (55 *&* 56 *Vict., c.*9), *s.* 1.

The plaintiff, as agent for the defendant, laid bets on horse races with a firm of bookmakers. A loss having resulted, the plaintiff communicated the bookmakers' account of winnings and losses to the defendant, who, while orally agreeing the accuracy of the accounts, failed to reimburse the plaintiff the sum paid to the bookmaker, and, to actions brought by the plaintiff as on an account stated, pleaded the defence of the Gaming Act, 1892. On an application by the defendant under Or. 25, r. 4, of the Rules of the Supreme Court the District Registrar of Boston struck out the action on the ground that the statement of claim disclosed no reasonable cause of action and was frivolous and vexatious. Slade J., in chambers, affirmed the order of the district registrar, and the plaintiff appealed.

Held, that the court had to look at the reality of the transaction, and that, the account stated being in respect of betting transactions, the action was clearly rendered null and void by s. 1. of the Gaming Act, 1892 and had been rightly struck out.

Decision of Streatfeild J. in *Alberg* v. *Chandler* (1948) 64 T. L. R. 394, approved.

Appeal from an order of Slade J. in chambers.

The plaintiff, a butcher in Spalding, acting as agent for the defendant, a local farmer, placed bets on the results of horse races with a firm of bookmakers. For a time the bets were successful from the defendant's point of view, and the plaintiff handed over the winnings to him. Later the bets were not so successful and the accounts received from the bookmaker showed a substantial loss to the defendant. Thereupon the plaintiff, having paid the bookmaker, communicated with the defendant, who, according to the plaintiff, agreed that the account was correct but failed to reimburse him. When sued by the plaintiff as on an account stated between principal and agent, the defendant pleaded the defence of the Gaming Act. On an application by the defendant the Boston District Registrar struck out the two consolidated actions brought by the plaintiff by order made under Or. 25, r. 4, of the Rules of the Supreme Court, on the ground that the statements of claim disclosed no reasonable cause of action, and were frivolous and vexatious and an abuse of the process of the court. On July 27, 1949, Slade J., in chambers, affirmed the order of the district registrar.

The plaintiff appealed.

Van Oss for the plaintiff. The appeal raises two questions: (1.) a point of procedural law, namely, what are the proper limits within which the inherent jurisdiction of the courts to strike out an action should be exercised; and (2.) whether as a matter of substantive law the judge was right in holding that the plaintiff's claim could not succeed. This court may think that the procedural point is even more important than the point of law, because there could not be a more important procedural question than that whether a plaintiff is to be barred in limine from his right of action. It is submitted that the present action is one that should not be struck out. The plaintiff, as an agent, seeks indemnity from the defendant as principal. So far as a direct indemnity in respect of wagers is concerned, he could not put forward a legitimate claim: it would be struck out. But the plaintiff claims on two accounts stated, one between himself and the bookmaker and the other between himself and the defendant, the backer. In order that Or. 25, r. 4 may be invoked for the purpose of striking out a claim, the allegations in the pleadings in the action must be taken as true, and if on their face they disclose a cause of action the claim should not be struck out: see *Gugenheim* v. *Ladbroke & Co. Ld.* (1). The jurisdiction under Or. 25, r. 4 has always been sparingly exercised, and, except in very plain and exceptional circumstances, the courts have refused to strike out an action in limine: see the judgment of Lord Herschell in *Lawrance* v. *Norreys* (Lord) (2) and observations of Fletcher Moulton L.J. in *Dyson* v. *Attorney-General* (3). True, the accounts stated in the present case are in respect of betting transactions, but it is clear from the speeches in the recent case, *Hill* v. *William Hill* (*Park Lane*) *Ld.* (4), and in particular that of Lord Greene, that some of the lords were of opinion that agreements might exist for good consideration which were not in fact agreements to pay betting debts, although they might have had their origin in betting transactions.

If the criterion were to be that the judge in chambers thought that on balance the law was against a claim, it would be most unfortunate. The result would be that no plaintiff could ever get an important point of law settled, such as arises in the present case, without going to the Court of Appeal—or to the House of Lords if he could get there. There is in the present case an important point of law for determination, and the plaintiff is entitled to have it settled. It is submitted that chambers are not the best forum. It is not at present clear beyond doubt, and it may be a point of difficulty which ought to be litigated properly, whether an agent who sues on an account stated in respect of betting transactions is barred from proceeding. An account stated is neither a promise to pay nor an agreement to pay within the meaning of s. 1 of the Gaming Act of 1892 (1), but a new and separate cause of action. The decision of the House of Lords in *Hill* v. *William Hill* (*Park Lane*) *Ld.* (2), does not cover the present case.

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(1) [1947] 1 All E. R. 292.
(2) (1890) 15 App. Cas. 210, 219.
(3) [1911] 1 K. B. 410, 418.
(4) [1949] A. C. 530.

Swanwick for the defendant. The claim is founded on two causes of action : (1.) money paid at the request of the principal, and (2.) on an account stated. It has been conceded that the first cause of action cannot succeed, and I am entitled to have it struck out. As to the second, an agent cannot obtain an indemnity from his principal for the payment of betting debts.

[Tucker L.J. How is this court to get over the decision in *Gugenheim* v. *Ladbroke & Co. Ld.* (3) ?]

By analysing that decision and also having regard to *Day* v. *William Hill* (*Park Lane*) *Ld.* (4). In the latter case Bucknill L.J. expressly stated that the proposition that an account stated could be used to recover a gambling debt was an attempt to circumvent the Gaming Act and render it ineffective. In *Gugenheim's* case (3) the majority of the court felt that, the matter being one of discretion, the facts compelled them to do something which they otherwise would not have done.

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(1) Gaming Act, 1892, s. 1 : "Any promise, express or implied, "to pay any person any sum of "money paid by him under or in "respect of any contract or agree-"ment rendered null and void by "the Act of the eight and ninth "Victoria, chapter one hundred "and nine, or to pay any sum of "money by way of commission, "fee, reward, or otherwise in "respect of any such contract, or "of any services in relation thereto "or in connexion therewith, shall "be null and void, and no action "shall be brought or maintained "to recover any such sum of "money."

(2) [1949] A. C. 530.

(3) [1947] 1 All E. R. 292.

(4) [1949] 1 K. B. 632.

[TUCKER L.J. It would be impossible to say that it was the decision of the court as a whole and that we are now bound by it. It cannot be taken to establish the principle that an account stated is not a cause of action which entitles a plaintiff to go to trial.]

It shows the extreme generality of the Acts and the necessity of going behind the façade to ascertain what is really the origin of the matter. The approved modern practice is to be found in the speech of Lord Simon in *Hill* v. *William Hill* (*Park Lane*) *Ld.* (1). There is a long line of cogent authorities which support the view that, where all the items in an agreed statement are void, no action can be brought which is founded on them. In *Alberg* v. *Chandler* (2) Streatfeild J. held that an action alleged to be brought on a separate agreement, amounting in law to an account stated, was unenforceable having regard to its wagering basis. That decision covers the present case, and under its inherent jurisdiction this court is entitled to look at the account and decide whether it is a real account stated. It would be a serious blot on legislation if, after all the time and ingenuity expended by plaintiffs in endeavouring to circumvent the Gaming Acts, it were held that an action on an account stated in respect of betting debts could be successful.

Van Oss, in reply. *Alberg* v. *Chandler* (2) is distinguishable from the present case. Before exercising his discretion and striking out a claim the judge must be certain that the action cannot succeed. On general grounds of justice this action should not be struck out.

TUCKER L.J. The plaintiff's case was that the obligations, the moral obligations perhaps, into which he had entered with the bookmaker had been incurred for and on behalf of the defendant; that is to say, that the plaintiff had acted as the defendant's agent in placing these bets with the bookmaker. The result of the transactions between the plaintiff and the bookmaker was that, at the time of the first statement of claim, 482*l.* 12*s.* 6*d.* was due, and at the time of the second, 483*l.*

Originally, in these statements of claim, the plaintiff claimed against the defendant in two alternative ways: He said,

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(1) [1949] A. C. 530.

(2) (1948) 64 T. L. R. 394.

C. A.
1949
Law
v.
Dearnley.
Tucker L.J.

in para. 1, that at the oral request of the defendant he had incurred certain debts to the bookmaker for and on behalf of the defendant and had made certain payments to the bookmaker in discharging the debts; and he gave particulars. He said that the defendant, by telephone on a certain date, refused to reimburse these sums, and continued: "Further, "or in the alternative, the plaintiff claims the said sum on an "account stated between the parties." By way of particulars, he said that on a certain date the defendant orally admitted to the plaintiff on the telephone, and agreed, that the account was correct as to amount. That is substantially the way in which the case was put in both statements of claim.

It has been said throughout these proceedings that these actions can only be maintained, if at all, under the alternative claim on an account stated. In the course of the proceedings the plaintiff was asked for further particulars of the debt and payments as between himself and the bookmaker. On March 22, 1949, he delivered the particulars, and the relevant ones are as follows: "There was in fact only one debt, namely, "the sum claimed in this action. The nature of the said "debt was that it was upon an account stated and agreed "between the plaintiff and the bookmaker on or about "June 28, 1948." So the plaintiff is relying upon two accounts stated. He says, first, that there was an account stated as between himself and the bookmaker; that, as a result of that there was a further account stated as between himself and the defendant; that it is in respect of the second account stated that he is bringing these actions; and that he is entitled to have tried in a court of law the issue whether the claims are maintainable.

Slade J. stated the point quite shortly when he dismissed these appeals. He said: "Will the action lie to "recover the amount agreed by the defendant on an account "stated, when admittedly each item of the account is in respect "of a debt rendered null and void by the Gaming Act, "1845, s. 18?"

Mr. Van Oss drew our attention to the speech of Lord Herschell in *Lawrance* v. *Norreys* (Lord) (1), where, speaking of this jurisdiction to dismiss actions in limine, he said: "It is "a jurisdiction which ought to be very sparingly exercised, "and only in very exceptional cases." In *Dyson* v. *Attorney-General* (2), Fletcher Moulton L.J. said: "It is unquestion-

(1) 15 App. Cas. 210, 219.

(2) [1911] 1 K. B. 410, 418.

"able that, both under the inherent power of the court and "also under a specific rule to that effect made under the "Judicature Act, the court has a right to stop an action at "this stage if it is wantonly brought without the shadow of "an excuse, so that to permit the action to go through its "ordinary stages up to trial would be to allow the defendant "to be vexed under the form of legal process when there could "not at any stage be any doubt that the action was baseless. "But from this to the summary dismissal of actions because "the judge in chambers does not think they will be successful "in the end lies a wide region, and the courts have properly "considered that this power of arresting an action and deciding, "it without trial is one to be very sparingly used, and rarely "if ever, excepting in cases where the action is an abuse of "legal procedure. They have laid down again and again "that this process is not intended to take the place of the old "demurrer by which the defendant challenged the validity "of the plaintiff's claim as a matter of law. Differences of "law, just as differences of fact, are normally to be decided "by trial after hearing in court, and not to be refused a hearing "in court by an order of the judge in chambers. Nothing "more clearly indicates this to be the intention of the rule "than the fact that the plaintiff has no appeal as of right "from the decision of the judge at chambers in the case of such "an order as this." Later on he says: "To my mind it is "evident that our judicial system would never permit a plaintiff "to be 'driven from the judgment seat' in this way without "any court having considered his right to be heard, excepting "in cases where the cause of action was obviously and almost "incontestably bad." That is undoubtedly the test to be applied, and the language used there is strong.

Approaching this case from that angle, I pass straight to a decision of this court in *Gugenheim* v. *Ladbroke & Co. Ld.* (1), where the court was faced with this problem. There the plaintiff was suing a firm of bookmakers on an account stated. The facts as set out in the judgment of Lawrence L.J., were as follows (2): "The plaintiff made various bets with "the defendants, who are a well-known company of book-"makers. The bets were made on credit. After the meeting "on July 1, 1946, the plaintiff put forward a claim to a sum of "8,784*l*., which, he said, was due to him on the bets that he "had made. On July 11 the defendants wrote to the plaintiff

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(1) [1947] 1 All E. R. 292. (2) Ibid.

"saying that they understood that he had been reported to "the stewards of the Jockey Club as a defaulter on bets and "warned off the course in England, and that in those circum-"stances they proposed to hold his account in abeyance until "he had settled certain alleged liabilities, and that they "differed in the figures which were put forward, but that "that could be adjusted when he had done as they suggested. "He denied what they had alleged, and the matter comes before "us on an affidavit which, as counsel for the defendants "agrees, must be taken as being true for the purposes of this "appeal." Therein the plaintiff alleged that "on July 27, "1946, his son and another man had an interview with the "representatives of the defendants and it was agreed that the "lesser items in the account which the plaintiff put forward "should be deemed paid and that, after cancelling out the "cross-claims, a final balance was due to him of 7,256*l*. In "arriving at this figure the plaintiff's son on his behalf agreed "to forgo the difference between it and the claim for 8,784*l*. "as a further consideration for the compromise. The writ "was issued on September 24, 1946, and by it the plaintiff "claimed 7,256*l*. from the defendants on an account stated."

It is clear that in that case an account stated in the full sense was being relied upon, that is to say, an account in which there were cross items on either side which, it had been agreed, should be considered as cancelling each other out, and that the balance thus arrived at was agreed. In those circumstances the judge in chambers, Denning J., had refused to strike the action out. It came before this court, of which Lawrence L.J., Cohen L.J. and myself were members. There were cited to us on that appeal all relevant authorities on this point, such as *Kershaw* v. *Sievier* (1), *Siqueira* v. *Noronha* (2), *Cocking* v. *Ward* (3), *Evans (Joseph) & Co. Ld.* v. *Heathcote* (4), and *In re Home & Colonial Insurance Co. Ld.* (5); and they are all referred to in the judgment of Lawrence L.J.

Lawrence L.J. was of opinion that there was a point capable or worthy of being argued, and that accordingly the action should be allowed to proceed. I expressed the contrary view, but I was not prepared to dissent from the order proposed by Lawrence L.J., having regard to the difference of judicial opinion. Cohen L.J. was disposed to agree with the view which I had expressed, although he added one or two other matters which he thought were also relevant. In that state of affairs I venture to think that it was clearly impossible to strike out an action in limine, two judges, at any rate, thinking that there was something to be argued. You can hardly " drive " a plaintiff from the judgment seat " by a majority judgment. I should have said that, even if one judge thought that there was something to be argued, quite clearly the action could not be struck out. That being the rather curious position, the action was allowed to go to trial. What happened to it thereafter nobody knows. The result, if there was one, has not been reported*.

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(1) (1904) 21 T. L. R. 40.
(2) [1934] A. C. 332.
(3) (1845) 1 C. B. 858.
(4) [1918] 1 K. B. 418.
(5) [1930] 1 Ch. 102.

If that position had remained unchanged down to the present date, I should have taken the view that this court would have been bound by the decision in *Gugenheim* v. *Ladbroke & Co. Ld.* (1) to take a similar course in the present case ; but the position has not remained unchanged. Since that date there have been two or three decisions. The most important, to my mind, is the decision of Streatfeild J. in *Alberg* v. *Chandler* (2). The head note to that case says : " Where an " agreement to pay debts is void under s. 18 of the Gaming " Act, 1845, an action cannot be maintained on an account " stated in respect of those bets." The facts showed that the defendant had placed bets on greyhounds from time to time, and that he had settled with the plaintiff at the end of each week. One day he had placed bets and had lost 15,000*l.* The plaintiff had laid off those bets with other bookmakers who wanted to be paid. " The following day the plaintiff " approached the defendant, who already owed him money " in respect of the previous week, for all the money which " he (the defendant) had lost. The defendant then said : " ' I will let you have the 3,800*l.* from last week, but I cannot " ' give you the whole of the money I have lost today. I will " ' give you 10,000*l.* on account and if you call at the usual " ' time tomorrow I will give you the cheques.' The plaintiff

(1) [1947] 1 All E. R. 292. (2) 64 T. L. R. 394.

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* Reporter's Note : The action, *Gugenheim* v. *Ladbroke & Co. Ld.* came for trial before Humphreys J., and a jury on January 26 and 27, and February 1 and 2, 1950. The judge ruled that, in view of the present decision, the action must fail, but allowed to be submitted to the jury the issue whether the plaintiff had, as the defendants alleged and the plaintiff denied, defaulted in the payment of betting debts in 1924, he having been warned off the turf at that time.

Tucker L.J.

"called on the defendant the next day, but could not find him. "As the defendant did not pay him the money owing, the "plaintiff brought this action for all the money which the "defendant owed to him." He brought the action on an account stated.

Streatfeild J. said (1): "It is admitted that the basis of "the claim for that sum is a series of betting transactions on "certain races. It is the kind of transaction which, under "s. 18 of the Gaming Act, 1845, is declared to be null and void. "The form of the action is framed therefore on an account "stated, and the plaintiff contends that, the defendant having "incurred this large indebtedness in respect of betting transactions, there was an independent and separate agreement, "amounting in law to an account stated, whereby the "defendant promised to pay these sums, and it is submitted "that this action is maintainable for that reason. On the "facts, the defence is devoid of all merits."

The judge went on to consider the case on the basis and assumption that there was an account stated, and he came to the conclusion, accepting that assumption, that none the less the action was not maintainable because it was an account stated in respect of betting transactions. He referred to *Evans* (*Joseph*) *& Co. Ld.* v. *Heathcote* (2), which was concerned with a different matter, and also to this passage in the judgment of Tindal C.J. in *Cocking* v. *Ward* (3): "The principle may "not, perhaps, be applicable to cases where it can be shown "the original debt is absolutely void from any illegal or "immoral consideration, or where it is made void by any "statute, as, by those against usury or gaming; but we think "it applies to cases where the only objection is, that the "original debt might not have been recoverable, from the "deficiency of legal evidence to support it." Streatfeild J. went on to say: "It may be that that statement of Tindal C.J. "was obiter, but, having regard to the words of s. 18 itself, "'all contracts or agreements, whether by parole or in writing, "'by way of gaming or wagering, shall be null and void,' "it seems to me to be impossible, in view of that statement, "to hold that, even if there was an account stated, it is enforceable as such, having regard to its wagering basis."

That decision of Streatfeild J. was referred to in this court in *William Hill* (*Park Lane*) *Ld.* v. *Rose* (4). Denning L.J., in his judgment, referring to it, said: "If this is correct "as I think it is, then the new promise here to pay the betting "debt by instalments was not a good consideration because "it added nothing to the original promise, and, if it was not "a good consideration, there was no new contract."

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(1) 64 T. L. R. 394.
(2) [1918] 1 K. B. 418.
(3) 1 C. B. 858, 870.
(4) [1948] 2 All E. R. 1107, 1112.

In *Day* v. *William Hill* (*Park Lane*) *Ld.* (1), this same question arose, but in that case, from both judgments, it was clear that the court came to the conclusion that the account stated, or alleged to be stated, was not an account stated in the true sense of the word. The headnote is as follows: "A book-"maker's weekly account sent to a client, containing a record "of wins and losses made by the client on bets made by him "during the week which, when set off against each other, "showed a balance due from the bookmaker to the client, "followed by the letters 'C.F.' (carried forward), is not an "account stated on which the client can sue the bookmaker "some months subsequently, since it is not an absolute "acknowledgment made by the bookmaker to the client of "a debt due from him to the client and payable at the time "of action brought." Having considered the case on that basis, Singleton L.J. at the end of his judgment, said: "Mr. Wingate-Saul submitted that even if the weekly book-"makers' account could be said to be an account stated, still "it was an account on which an action could not succeed, "having regard to the terms of s. 18 of the Gaming Act, 1845, "and he referred us to certain words of Farwell L.J. in *Hyams* "v. *Stuart King* (2); to what was said by Pickford and "Scrutton L.JJ. in *Evans* (*Joseph*) *& Co. Ld.* v. *Heathcote* (3); "and to *Alberg* v. *Chandler* (4), a recent decision of Streatfeild J. "I do not think it is necessary to go into these matters, but "I am satisfied, for the reasons I have given, that this appeal "ought to be dismissed." So that the larger question whether, if there is a true account stated in respect of betting transactions, such an action could succeed, was clearly left open.

Bucknill L.J. agreed. At the conclusion of his judgment, he added: "Mr. Caplan was, I think, compelled to admit "that if the plaintiff had made one bet and one bet only in "respect of any particular week, and had received a weekly "account showing that he had won say 100*l.* on that bet, "that could not be said to be an account stated on which an "action would lie. On the other hand, if he made two bets,

(1) [1949] 1 K. B. 632.
(2) [1908] 2 K. B. 696.
(3) [1918] 1 K. B. 418.
(4) 64 T. L. R. 394.

" and he won on the first bet and lost on the second, and the " weekly account showed that there was a balance due to him, " that that would be an account stated, and he could recover " that. If that were the state of the law, the result would " be to render s. 18 of the Gaming Act, 1845, ineffective. " I think that this is an attempt to circumvent that Act, and it " ought not to succeed, and that the order of the learned judge " was right." It was argued by Mr. Swanwick that that concluding observation of Bucknill L.J. indicated that the Lord Justice had decided the case on the precise ground which Singleton L.J. had expressly refrained from considering. I cannot so read the language used, and I am quite satisfied, for my part, that he never intended to do any such thing; therefore, in my view, that case does not really assist the argument here.

Since *Gugenheim's* case (1) the parties have been allowed to litigate this matter in a court of law, which was what Lawrence L.J. thought that they should be allowed to do. Streatfeild J. has decided (and there is an expression of concurrence with his judgment by Denning L.J.) that an action of this kind—when I say " an action of this kind " I am not losing sight of the distinctions between the present action and *Alberg* v. *Chandler* (2) on which Mr. Van Oss relies, and I shall refer to them in a moment—an action of this kind as between a bookmaker and his client, where the Act of 1845 applies—an action on an account stated in respect of betting transactions—is not maintainable. I think that, if this court is satisfied beyond doubt that that decision is right and represents the law, then it is its duty to strike out such an action. Mr. Van Oss says that, if that is the position, nobody can ever get an important point of law settled without going to the House of Lords, if he can get there, or to the Court of Appeal, if he can get there, on interlocutory proceedings of this kind. Of course, that argument has to be carefully considered. Nevertheless, if this court is satisfied that an action is quite unmaintainable, and that to allow it to proceed would be an abuse of the process of the court, I think that it is bound to say so, and that it can say so even if there is not any express decision of this court or of the House of Lords to that effect. There are some points of law that are so clear that no express authority can be found for them. I venture to think that this point is tolerably clear, has been so for a number of years, and has now been made clearer still by the judgment of Streatfeild J.

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(1) [1947] 1 All E. R. 292.

(2) 64 T. L. R. 394.

I think it necessary, however, to glance at the cases on which Streatfeild J. based his judgment, now that we are deciding that his judgment is correct. In that connexion I would refer, first, to what was said by Maugham J. in *In re Home & Colonial Insurance Co.* (1). In that case, which arose on the winding-up of a limited company, it was held among other things, fifthly, "that where an agreement is wholly "void, items alleged to be due in respect of it are not a proper "basis for an action on an account stated, and that a proof "based on an account stated in such circumstances must be "rejected."

Maugham J. (2), after referring to *In re Laycock* v. *Pickles* (3), quoted from Blackburn J., where he had said (4): "'the "'consideration for the payment of the balance is the discharge "'of the items on each side,'" and continued: "Then "Blackburn J. adds: 'It is then the same as if each item was "'paid and a discharge given for each, and in consideration "'of that discharge the balance was agreed to be due. It is "'not necessary in order to make out a real account stated, "'that the debts should be debts in praesenti, or that they "'should be legal debts. I think equitable claims might "'be brought into account, and I am not certain that a moral "'obligation is not sufficient.'" Maugham J. went on: "It is contended on behalf of the respondent that there "was here a clear moral obligation on each side, and that this "brings the case within the statement of Blackburn J., even "if the participation agreement was wholly null and void. "I do not think it necesary to go through and comment on all "the cases that were cited to me on this topic, for I am content "to follow the observations of the Court of Appeal in the "case of *Evans (Joseph) & Co. Ld.* v. *Heathcote* (5). It is "true that, on the facts in that case, the court held that the "plaintiffs were entitled to recover upon an account stated; "but the learned judges, in order to arrive at that conclusion, "considered it necessary to examine the question whether the "agreement between the parties was void or whether it was "only such a contract that it could not be directly enforced. "Pickford L.J. expressly says: 'I do not think that, where

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(1) [1930] 1 Ch. 102.
(2) [1930] 1 Ch. 102, 129.
(3) (1863) 4 B. & S. 497.
(4) Ibid. 506.
(5) [1918] 1 K. B. 418.

C. A.
1949
LAW
v.
DEARNLEY.
Tucker L.J.

" 'a contract from its nature can give rise to no valid claim, " 'a claim upon it can be used to found an action upon an " 'account stated.' This dictum is exactly in point. Bankes " L.J. comes to this conclusion : 'The position of the agree- " 'ment sued on, therefore, under these Acts, is that it is " 'neither void nor voidable, and there is nothing in the Act " 'which prevents the court from accepting the debt created " 'under the agreement as a proper foundation for an account " 'stated.' " The Act in question there, I should add, was not the Gaming Act. Maugham J. continued : " Scrutton L.J., " cites with approval a passage from the judgment of " Tindal C.J. in *Cocking* v. *Ward* (1) in the following terms " . . . ." I need not refer to that again in detail. " Scrutton " L.J. then goes on to point out that since 1871 a con- " tract in restraint of trade between members of a trade union " is no longer void but is not directly enforceable. I conclude " from these observations that where an agreement is wholly " void and a fortiori where the entry into it or the taking " credit in account in respect of it is an 'offence,' items alleged " to be due under such an agreement cannot properly be used " to found an action on an account stated." I need not refer to the rest of that judgment.

In *Morgan* v. *Ashcroft* (2), an action in which the taking of an account was claimed, Sir Wilfrid Greene, M.R., said (3): " In substance the dispute between the parties is a dispute " between a backer and a bookmaker as to the state of the " account between them. The fact that the defendant's " cross-claim is raised by way of counterclaim and not by way " of set-off does not, in my view, affect the substantial point " that in order to ascertain whether or not an overpayment " had been made which the plaintiff was entitled to recover it " was necessary for the court to examine the state of the " account between the parties. Now this, in my opinion, " is a thing which the court is not entitled to do, since by " merely taking the account the court would necessarily be " recognizing wagering transactions as producing legal obliga- " tions and therefore doing the very thing which the Gaming " Act, 1845, does not permit to be done."

The relevance of those observations, as is submitted by Mr. Swanwick, is this : precisely the same sort of considerations might arise in an action brought on an account stated where the defendant was challenging the account which was alleged to have been stated on the ground of error, or on some such ground. That would necessitate the courts going into the origin and nature of the detailed items in precisely the same way in which it might be called on to do so where an account was being taken.

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(1) 1 C. B. 858.
(2) [1938] 1 K. B. 49, 60.
(3) Ibid. 60.

Finally (and I think it the most important of all) comes *Hyams* v. *Stuart King* (1). The actual decision in that case has recently been overruled by the House of Lords in *Hill* v. *William Hill* (*Park Lane*) *Ld.* (2). But it is important to notice that the claim in *Hyams* v. *Stuart King* (1) was originally framed on an account stated. The headnote in the Law Reports states: "The writ in the action was indorsed with "a statement of claim upon an account stated, but at the "trial the plaintiff set up, and recovered upon, the fresh "agreement; no formal amendment of the statement of "claim was made at the trial, but all necessary amendments "were taken as having been made." On that part of the case, Fletcher Moulton L.J. said (3): "There is no doubt that "a cheque may be evidence of an account stated, but that "cheque must under that statute be taken to have been given "for an illegal consideration, and an account stated for an "illegal consideration is as unenforceable as a cheque given "for an illegal consideration. And, apart from the fact that "the alleged account stated is a cheque, the mere fact that "the account stated is for bets would, under the provisions "of the Gaming Act, 1845, which render wagering contracts "null and void, suffice to render the action unsustainable. "Counsel for the plaintiff realized that his case was hopeless "if it had to depend on the cheque, and he faintly suggested "that the action was brought not upon the cheque, but upon "the balance of account for which that cheque was given— "in other words, that it was an action not upon the cheque, "but upon the consideration for the cheque. That cause of "action is equally bad. It would be a plain case of suing "for money won on bets." Farwell L.J. said (4): "This is "an action for a balance upon an account stated, the full "amount stated as being originally due being 108*l.* 10*s.*, "which is the amount of a cheque drawn by the defendant "and given to the plaintiff in payment of a bet made by the "defendant's firm with the plaintiff. It is admitted that no

(1) [1908] 2 K. B. 696.
(2) [1949] A. C. 530.
(3) [1908] 2 K. B. 719.
(4) Ibid. 724.

"action could be successfully brought on the cheque, and it "is in my opinion equally clear that no action will lie on an "account stated of which the bet or the cheque forms the "foundation: such an action is brought on an admission "of a sum of money due and is a recognized cause of action, "but it does not create a merger or destruction of the items of "such account, and if such items are illegal, the action fails." No words could be clearer than that. It is because, as I think, everybody has always recognized that that is the position that no case is to be found in the books in which any action so framed has ever succeeded.

The decision in *Hill* v. *William Hill* (*Park Lane*) *Ld.* (1), although that was a case under the Gaming Act, 1845, strengthens the view put forward by Mr. Swanwick here. There it was decided that, although there might be an entirely fresh consideration for the payment of a gaming debt, none the less, if that which was agreed to be paid was in fact a gaming debt, then the plaintiff could not recover under such a contract. The speeches of the majority emphasized the fact that it is the reality of the transaction with which the courts are concerned. For instance, Lord Simon said (2): "The arrangement, "by the very terms of the letter of August 17, is to pay by "instalments 'the balance of our account' and the account "is an account of betting transactions and of nothing else." He further said (3): "But it appears to me that, at any rate "on the facts of the present case, it is clear that the sum of "money sought to be recovered not only owes its origin to "the fact that bets were made but is itself a sum of money "so won."

In my view, there is certainly no comfort to be gained from that case by Mr. Van Oss. The fact that Lord Greene indicated that it was possible that agreements might exist for good consideration which were not in fact agreements to pay betting debts, although they might have had their origin at the outset in some betting transactions, is an entirely different consideration.

In conclusion, I think it only necessary to dispose of Mr. Van Oss's argument that the Act with which we are now concerned, namely, the Act of 1892, is different from that with which Streatfeild J. was concerned in *Alberg* v. *Chandler* (4) and from that with which the House of Lords was concerned in *Hill* v. *William Hill* (*Park Lane*) *Ld.* (1). The Gaming

(1) [1949] A. C. 530.
(2) Ibid. 546.
(3) Ibid. 548.
(4) 64 T. L. R. 394.

Act, 1845, by s. 18, provides: "All contracts or agreements, "whether by parole or in writing, by way of gaming or wagering "shall be null and void; and no suit shall be brought or "maintained in any court of law and equity for recovering "any sum of money or valuable thing alleged to be won "upon any wager, or which shall have been deposited in the "hands of any person to abide the event on which any wager "shall have been made." The Gaming Act, 1892, was passed to meet in terms the case where there is the intervention of an agent. The headnote to *Tatam* v. *Reeve* (1) states: "The Gaming "Act, 1892, s. 1, enacts that any promise, express or "implied, to pay any person any sum of money paid "by him under or in respect of any contract or agreement "rendered null and void by 8 & 9 Vic., c. 109, shall be null and "void, and no action shall be brought or maintained to recover "any such sum of money: Held, that money paid by the "plaintiff for the defendant at his request to persons with "whom the defendant had lost bets was money paid 'in "'respect of' a gaming contract within the meaning of the "Gaming Act, 1892, and therefore that the plaintiff could not "recover the sums so paid by him from the defendant."

In my view, the reasoning in all the cases to which I have referred applies equally to the Act of 1892 as to the Act of 1845. In fact, though Mr. Van Oss very properly emphasized that we were here concerned with a different Act, I am not conscious that he advanced any argument showing what the difference in principle was between the two Acts for present purposes. I am clearly of opinion that there is none. He also pointed out that *Alberg* v. *Chandler* (2) was a case between a bookmaker and a backer, whereas this is between the backer and his agent; and that the latter is relying on two accounts stated, one as between the bookmaker and himself, and the other as between himself and the backer. I cannot see how that can make any difference. If accounts stated of this kind in respect of admittedly betting transactions, and relating only to betting transactions, are as void as the transactions themselves, I cannot see how it can help the plaintiff that there were two of them rather than one.

Although it has been necessary to examine a number of cases, the result, I think, is clear. As I have said before, until the recent effort to get round the Gaming Act by means of actions of this kind, it had always been recognized that such

(1) [1893] 1 Q. B. 44. (2) 64 T. L. R. 394.

an obvious dodge, if I may use the word, was doomed to failure. That being the case, the law now having been definitely settled to that effect by the decision of Streatfeild J., which I think is clearly right, in my opinion it is the duty of this court to see that actions which are in reality actions in respect of betting transactions, which are betting transactions only but are given the guise of legitimate transactions by being described as accounts stated, should not be allowed to continue. For these reasons, I think that this appeal fails.

I wish to add that I have approached this case on the assumption that both the accounts stated relied upon by Mr. Van Oss are real accounts stated, to use the language of Blackburn J. in *In re Laycock* v. *Pickles* (1), that is to say, that they are accounts of such a nature that, when the several items of claim are brought into the account on either side and set against one another, and a balance is struck, the consideration for the payment of the balance is a discharge of the items on each side. But I wish to make it clear that, in my view, in a case of this kind, it can make no difference whatever which precise form of account stated is in question. In *Camillo Tank Steamship Co. Ld.* v. *Alexandria Engineering Works* (2) there will be found much learning on the subject of accounts stated, but my judgment applies equally to any one of the forms of accounts stated which are referred to in that case and have their origin in betting transactions and consist of such items only.

Singleton L.J. Applications to strike out statements of claim under Or. 25, r. 4, or under the inherent jurisdiction of the court, have been fairly frequent of late. I do not think that they ought to be encouraged. It is clear in the present case that the subject-matter of the litigation was betting and nothing else. The plaintiff's statement of claim, which in the alternative (and that is the only part that we have to consider) is based on an account stated, gives as particulars that on July 8, 1948, the defendant orally admitted to the plaintiff on the telephone and agreed that the payment was correct as to amount. Some question was raised by Mr. Swanwick whether or not that could constitute an account stated, but, for the purposes of my judgment, I assume that it was an account stated in the strict sense of the word. That pleading led to a request for particulars, and particulars, and then

(1) 4 B. & S. 497. (2) (1921) 38 T. L. R. 134.

further particulars, were given. The first of those particulars reads as follows: "The best particulars that the plaintiff "can give of the request by the defendant are that the "defendant asked the plaintiff to put some money on horses "for him in the plaintiff's name with A. Harden & Company "of Spalding." Then it is alleged that thereafter the plaintiff, having received the account from the bookmaker or from the firm, agreed the amount due, and the items which were cross items.

So the plaintiff's claim is founded on an account stated, which, Mr. Van Oss submitted, made the case different from the other cases which had been decided under applications of this kind. In one sense that is right, but there is no getting away from the fact that the plaintiff sued the defendant in respect of bets on horses and really on nothing else, whatever he may choose to call the action. If a man makes bets in this way, of course he ought to pay them. If he does not do so, it bears rather a nasty look. That is why these applications are made to strike out statements of claim: because it is thought that that will avoid publicity. In the ordinary course, if the application succeeds before the master and there is no appeal, that is the result—the defendant avoids publicity. It may be that the plaintiff's desire, on the other hand, is sometimes that there should be publicity. In this case the registrar struck out the statements of claim, the plaintiff appealed, and Slade J. upheld the decision of the registrar. The plaintiff now appeals to this court. The result of all this is that the defendant, notwithstanding his desire not to do so, may have achieved some publicity. He may, indeed, have been the means whereby others may be able to succeed in striking out a statement of claim if a plaintiff is so rash as to bring proceedings of this kind in the future. The fact remains that the courts of this country are not meant for use for the recovery of gambling debts. Everyone has recognized that for a long time. That is why other names or labels are put upon them when they are brought into court.

However, I think that it would have been better from everyone's point of view if in this case the application to strike out had not been made. The record of proceedings is quite voluminous already. The costs are considerable. There have been the hearings to which I have referred, which have taken some time, and there has been in this court a full argument upon the authorities. There have been several cases of this kind which have reached the Court of Appeal recently, and my Lord has referred to two of them. When *Day* v. *William Hill* (*Park Lane*) *Ld.* (1) was before this court, I thought that *Gugenheim* v. *Ladbroke & Co.* (2) presented some difficulty; but in the result it did not, because, when the document, which was said to be an account stated in *Day* v. *William Hill* (*Park Lane*) *Ld.* (1), was examined, it was clear that it was not an account stated at all. On this appeal we had presented to us the difficulty raised by *Gugenheim's* case (2) We have had the opportunity of examining the authorities on matters of this kind, and in the result I find myself satisfied that the plaintiff here could not succeed if his action went to trial. Virtually, what has been done here is to try his action.

I do not propose to refer in detail to the authorities cited. What was said by Fletcher Moulton L.J. in *Hyams* v. *Stuart King* (3), followed as it was by the statement of Farwell L.J. in the same case (4), expresses a very strong view on claims of this nature. The same view was taken by Maugham J. in *In re Home & Colonial Insurance Company* (5), and by Streatfeild J. in *Alberg* v. *Chandler* (6). The judgment of Streatfeild J. in that case was expressly approved by Denning L.J. in this court in *William Hill* (*Park Lane*) *Ld.* v. *Rose* (7). Again in the recent case of *Hill* v. *William Hill* (*Park Lane*) *Ld.* (8), in the House of Lords, Lord Simon said: "The arrangement, by the very terms of the letter of August 17, "is to pay by instalments 'the balance of our account' and "the account is an account of betting transactions and of "nothing else. The first limb of s. 18 does not apply to the "case because the contract sued on is not 'by way of gaming "'or wagering,' but is a new bargain, but, inasmuch as the "new bargain was to pay the betting account, an action "brought on it, as it seems to me, is nevertheless brought for "recovering sums won by betting." No good purpose would be served by going into these authorities further, but I am satisfied, as I have said, that the plaintiff could not succeed in this case if it were allowed to go to trial.

What, then, ought this court to do? I have said already that I think that it would have been better and cheaper for

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(1) [1949] 1 K. B. 632.
(2) [1947] 1 All E. R. 292.
(3) [1908] 2 K. B. 719.
(4) Ibid. 724.
(5) [1930] 1 Ch. 102.
(6) 64 T. L. R. 394.
(7) [1948] 2 All E. R. 1110.
(8) [1949] A. C. 530, 546.

C. A.

1949

LAW
v.
DEARNLEY.

Singleton L.J.

everyone if the action had gone for trial. I recognize the position under applications of this sort, and I bear in mind the words of Fletcher Moulton L.J. in *Dyson* v. *Attorney-General* (1), who stressed the general principle that the court ought not to strike out a pleading if any cause of action is shown, and that this particular rule was never intended to apply to any pleading which raises a question of general importance or serious questions of law. Still, in the circumstances, and after the argument which has taken place in this court, and being satisfied that the plaintiff could not recover, I think that it is the duty of this court to say so. To hold otherwise would only add to expense and be a waste of time. I agree that this appeal fails on the ground that the plaintiff has no reasonable cause of action.

JENKINS L.J. I agree. Assuming that the plaintiff succeeded at the trial in establishing the most favourable possible state of facts, that is to say, assuming that he could succeed in showing, not only that the two accounts were stated accounts as between himself and the bookmaker in the sense that every item on each side of the account had been gone through and agreed, and the balance struck; assuming, further, that he could allege and prove at the trial similar circumstances as between himself and the defendant, nevertheless it seems to me impossible that his action should succeed. The plaintiff, having paid the balances of the two accounts to the bookmaker, seeks to recover those balances from the defendant. He is at once faced by s. 1 of the Gaming Act, 1892, which provides in effect that "Any promise, express or "implied" on which he bases his action against the defendant is null and void if the sums which the plaintiff paid to the bookmaker and now seeks to recover from the defendant are sums paid under or in respect of contracts rendered void by the Gaming Act, 1845. The sums in question here were balances of accounts which are to be assumed for this purpose to be stated accounts. But it seems to me abundantly plain (even apart from authority) that the balance of a betting account is a balance in respect of bets and nothing else. The accounts here are simply and solely accounts of betting transactions. The fact that the transactions on each side are set off against each other and a balance one way or the other is arrived at does not alter the character of the balance and make

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(1) [1911] 1 K. B. 410.

C. A.
1949
LAW
v.
DEARNLEY.
Jenkins L.J.

it a balance in respect of something other than bets. I think that clear on the plain language of the section; and it is also clear on the authorities to which my Lords have referred. Once the conclusion is reached that those sums are paid in respect of contracts avoided by the Gaming Act, 1845, there is necessarily an end of the case, for the defendant's promise to pay the sums is rendered null and void by the express terms of the section.

It matters not whether the defendant's promise be regarded as an express or implied promise to indemnify the plaintiff as his agent, or as a promise arising on a stated account: the former promise must obviously be void ab initio because it was nothing more or less than a promise to pay the plaintiff whatever sums he laid out, as agent for the defendant, in betting transations. A promise of the latter type, in my judgment, is in no better position. Once the principle is accepted that the balance of these betting accounts is a balance in respect of betting, then one cannot out of accounts stated as between the plaintiff and the defendant construct a promise which is anything else than a promise to pay sums paid by the plaintiff in respect of contracts avoided by the Act of 1845.

I have nothing to add, except to endorse it, to what my Lords have said about the caution with which the court should view an application to strike out proceedings as disclosing no cause of action. I agree that, before taking that step, the court should be very sure that there is indeed no cause of action, and that the plaintiff should be given the benefit of every possible doubt. But in this case, after the very full argument which we have heard, I agree with my Lords that it is abundantly plain that the action could not succeed; and it follows that the proper course is to affirm the order of the judge in chambers.

Appeal dismissed.
Leave to appeal to
House of Lords refused.

Solicitors: *Gibson & Weldon, for Cecil Crust & Co., Spalding; Lee, Bolton & Lee, for Roythorne & Co., Spalding.*

A. W. G.

Applied. PRATT *v.* RICHARDS [1951] 2 K. B. 208 *Reversed.* H.L. [1951] 2 All E.R. 1.

HORTON *v.* LONDON GRAVING DOCK CO. LD.

C. A.
1949
Nov. 30;
Dec. 1, 2, 21.

Tucker, Singleton and Jenkins L.JJ.

Negligence—Personal injuries—Invitor and invitee—Duty of invitor—Damage from "unusual danger"—Meaning of—Ship repairer occupying ship responsible for inadequate staging—Liability to injured employee of sub-contractor.

As between invitor and invitee, while the invitor is liable for damages caused to the invitee by reason of the existence of a trap of which the invitor knew or ought to have known, it is not a necessary condition of his liability that the danger which caused the accident to the invitee should be a hidden danger. The invitor may still be responsible to the invitee for a danger of which the invitee was aware, but which he could not avoid by the exercise of reasonable care on his part, unless the invitor can prove that the invitee was not only aware of it but voluntarily accepted the risk.

In 1946 the plaintiff, a man aged 67 years, an experienced electric welder, was working on a trawler in the defendant's graving dock, when he sustained serious injuries. The trawler, which had been released from requisition, was being reconverted into a fishing vessel by the defendant ship repairers, and the plaintiff, with other employees of a sub-contracting firm, had for over a month been engaged in welding work in the fish hold of the vessel. To enable the welders to carry out their work the defendants had erected a staging consisting of two planks on either side of the hold, running fore and aft and resting at either end on angle irons. No boards were provided for crossing the space of 4½ feet from the planks on one side to those on the other side, and for that purpose the workmen had to make use of the angle irons. The workmen had complained to a representative of the defendants of the inadequacy of the staging, but nothing had been done. In those circumstances, while the plaintiff, when handing a bag of tools to a fellow-workman, was stepping on an angle iron, his foot slipped and he fell astride the iron and sustained injury. He claimed damages against the defendants for breach of duty and negligence. Lynskey J. found for the defendants. He held that their duty as invitors was that stated by Willes J. in *Indermaur* v. *Dames* (1866) L. R. 1 C. P. 274, i.e., to prevent damage to the invitee from unusual danger; that "unusual" danger meant danger unusual from the point of view of the particular invitee, and unexpected by him; and that in the circumstances such risk as there was in using the angle iron was obvious to the plaintiff. On appeal:

Held, that the defendants had failed in their duty to take reasonable care to make the premises safe, and, having failed to prove that the plaintiff had voluntarily accepted the risk, were liable to him in damages.

Per Singleton L.J., the danger created by the staging being

C. A.

1949

Horton
v.
London
Graving
Dock
Co. Ld.

insufficient was an "unusual" one in that it was of a kind not usually encountered.

Held, further, that the defendants owed a duty to the employees of their sub-contractors, equally with their own workmen, to provide proper equipment for their use, and, having failed to do so, were liable to the plaintiff on this ground also.

Decision of Lynskey J. [1949] 2 K. B. 584, reversed.

Rule in *Indermaur* v. *Dames* (1866) L. R. 1 C. P. 274, discussed and explained.

Heaven v. *Pender* (1883) 11 Q. B. D. 503, as explained in *Donoghue* v. *Stevenson* [1932] A. C. 562, and *Donoghue* v. *Stevenson* (supra), applied.

Appeal from Lynskey J.

The plaintiff, Horton, a man then 67 years of age, was a boiler maker, and for the last thirty-four years had been an electric welder. The Thames Welding Co., the firm by which he was employed, had a sub-contract with London Graving Dock Co. Ld., the defendants, to do certain welding work on the trawler *Valmont*, which was lying in one of the wet docks of the East India Docks and was being reconverted into a fishing trawler by the defendants, after being released from requisition as a naval vessel. The defendants were in occupation of the vessel but not of the dock, and the shipbuilding regulations were not operative. The plaintiff was engaged with other welders in the fish hold in welding strips of steel to the ribs of the trawler. For the purpose of enabling the welders to carry out their work the defendants provided a staging which consisted of four boards or deals about 20 feet in length, 11 inches wide, and 3 inches in depth. The boards rested on two angle irons and were placed, one 18 inches from the port side of the vessel, the next about 5 feet from the first, the third about 5 feet from the second and the fourth about 5 feet from the third and about 18 inches from the starboard side of the vessel. If the plaintiff or any of his fellow welders found it necessary to cross from one plank to another they could only do so by stepping on an angle iron, there being no boards placed athwart the ship. The plaintiff had been working on the trawler since August, 1946, and had been using the staging for about a month before December 16, 1946. On that day he had been standing, in the course of his work, on one of the middle deals on the starboard side. He had temporarily finished his work and was in the act of handing a tool box to his fellow welder. The distance between the deal on which the plaintiff was standing and the deal on which his fellow workman was standing was about 4½ feet. In order to be able to hand over the tool box he had to place one foot on the angle iron. Having handed over the box, he was trying to get both feet back on to the starboard deal when his foot on the angle iron slipped and he fell astride it, sustaining the injuries for which he brought the present action. By his statement of claim the plaintiff alleged that his injury was caused by a breach of the duty which the defendants, as invitors, owed to him as an invitee.

On June 2, 1949, Lynskey J. gave judgment for the defendants. Their duty as invitors, he said, was that stated by Willes J. in *Indermaur* v. *Dames* (1), namely, to prevent injury to the plaintiff from " unusual danger," which he was of opinion meant danger unusual from the point of view of the particular invitee and unexpected by him, whereas such risk as there was in using the angle irons was obvious to the plaintiff. The plaintiff appealed.

Edgedale K.C. and *C. J. A. Doughty* for the plaintiff. It is admitted that the staging was insufficient, and it is clear that if it had been proper staging the accident to the plaintiff would not have happened. The point for decision is therefore one of law, whether or not knowledge by the plaintiff that the staging is defective makes a danger, which must have been an unusual one at the beginning, not an unusual one at the time of the accident. The duty of an invitor to an invitee is expressed in *Indermaur* v. *Dames* (1) by Willes J., in the following terms : " With respect to such " a visitor at least, we consider it settled law, that he, using " reasonable care on his own part for his own safety, is entitled " to expect that the occupier shall on his part use reasonable " care to prevent damage from unusual danger which he " knows or ought to know ; and that where there is evidence " of neglect, the question whether such reasonable care has " been taken by notice, lighting, guarding or otherwise, and " whether there was contributory negligence in the sufferer, " must be determined by a jury as a matter of fact." In Salmond on Torts, 10th ed., p. 479, the author suggests that the foregoing passage contains an unfortunate ambiguity ; but it is submitted that, but for some of the obiter dicta of the judges, there would be no ambiguity. The invitee is entitled to expect that the invitor will take all reasonable care to prevent damage from unusual danger of which he knows

(1) (1866) L. R. 1 C. P. 274, 285, 287, 288.

C. A.

1949

HORTON v. LONDON GRAVING DOCK CO. LD.

or ought to know, and notice only helps the invitor if it makes the invitee guilty of contributory negligence. The expression "unusual danger" is perhaps rather loosely used, but it is submitted that any danger of the kind which existed in the present case and which is not usual on the particular premises is an unusual danger. It is not usual for welders to work on such a staging. A usual danger is one which would ordinarily be associated with particular premises, and one which a workman would expect to find on premises which he was under contract to use. The duty of an invitor to an invitee is to take due care to see that the premises to which the invitee is invited are reasonably safe. Should the invitor fail in that duty he is responsible for all damage which is the reasonable consequence of his breach of duty, and it is no defence that the invitee had notice of the danger, unless the effect of that notice was to give him a reasonable opportunity of avoiding the consequences of the danger. A workman is not given a reasonable opportunity of avoiding the consequences of the danger if the only way in which he can be sure of doing so is by giving up his work. Even if the invitee knows of the danger it still remains an unusual one for him, against which he is entitled to protection, unless it can be shown that he freely and voluntarily, and with knowledge of the risk which he was running, expressly or impliedly agreed to accept it. The evidence clearly shows that the plaintiff in fact protested against the risk.

Hyett v. *Great Western Ry. Co.* (1); *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck* (2); *Norman* v. *Great Western Ry. Co.* (3); *Mowbray* v. *Merryweather* (4); *Brackley* v. *Midland Ry.* (5); *Fairman* v. *Perpetual Investment Building Society* (6); *Weigall* v. *Westminster Hospital* (7); *Marney* v. *Scott* (8); *Osborne* v. *L. & N.W. Ry. Co.* (9); *Heaven* v. *Pender* (10); and *Bowater* v. *Rowley Regis Corporation* (11) referred to.]

Marven Everett for the defendants. Where there is no contractual relationship between the parties the duty of the occupier is not co-extensive with that of an employer. On the authorities, the only duty owed by the defendants is that of

(1) [1948] 1 K. B. 345, 347.

(2) [1929] A. C. 358, 364.

(3) [1915] 1 K. B. 584.

(4) [1895] 2 Q. B. 640.

(5) (1916) 85 L. J. (K. B.) 1596.

(6) [1923] A. C. 74.

(7) (1936) 52 T. L. R. 301.

(8) [1899] 1 Q. B. 986.

(9) (1888) 21 Q. B. D. 220.

(10) 11 Q. B. D. 503, 509.

(11) [1944] K. B. 476.

invitors, which, as laid down by Willes J. in *Indermaur* v. *Dames* (1), is to prevent damage to the invitee from unusual danger. Such a danger means a danger which is unusual from the point of view of the particular invitee concerned. The word "unusual" connotes something unexpected, and "unexpected" connotes something in the nature of concealment of danger. It need not necessarily be physical concealment. In *Griffiths* v. *Smith* (2) Lord Maugham referred to hidden danger, and it is submitted that unusual means hidden in the wide sense above suggested. A plaintiff who works on premises for weeks and becomes thoroughly aware of the layout of those premises cannot claim that the staging in question constitutes an unusual danger. Knowledge of a danger is a very important factor in such cases as the present, and it is apparent that it did play a very considerable part in the decision in *Indermaur* v. *Dames* (1). There must be ignorance on the part of the invitee before any duty arises on the part of the invitor to give warning of possible danger. The plaintiff was fully aware of the nature and condition of the staging, and in those circumstances the maxim volenti non fit injuria applies and he cannot recover. The decision of the trial judge is very strongly supported by this passage from the judgment of Phillimore L.J. in *Norman* v. *Great Western Ry. Co.* (3): "In my view 'unusual danger' means a danger "unusual from the point of view of the particular invitee ". . . . It must be, from his point of view, unexpected in the "particular circumstanecs in which he is availing himself of "the invitation."

[Counsel also referred to *Hodgson* v. *British Arc Welding Co.* (4); *Heaven* v. *Pender* (5); *Letang* v. *Ottawa Electric Railway Co.* (6), and *Jacobs* v. *London County Council* (7).]

Edgedale K.C. in reply.

Cur. adv. vult.

Dec. 21. TUCKER L.J. I will ask Singleton L.J. to read the first judgment.

SINGLETON L.J. [having stated the facts] In the condition in which it was the staging was defective in that it was insufficient. There is no doubt of that. It could have been made satisfactory by the use of more deals—for example, by the use of a couple of cross boards. As it was, it constituted a danger which led to an accident to the plaintiff. The staging was erected by the defendants, and the sub-contractor's men had no right to interfere with it. The welders worked in pairs, one relieving the other from time to time so as to avoid undue strain on the eyes. The plaintiff and the man with whom he worked had worked in the fish house for some time before it became necessary for them to use the staging. It is clear that before the date of the accident, December 16, 1946, complaints of the insufficiency of the staging were made by the plaintiff and by other welders to the defendants' chargehand. One of the witnesses said that he had complained to his employers' foreman as well as to the defendants' charge hand.

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(1) L. R. 1 C. P. 274.

(2) [1941] A. C. 170, 182.

(3) [1915] 1 K. B. 584, 596.

(4) [1946] K. B. 302.

(5) 11 Q. B. D. 509.

(6) [1926] A. C. 725.

(7) [1949] 1 K. B. 685.

[His Lordship read extracts from the evidence about these complaints and continued :] The plaintiff brought this action against the defendants, alleging that they were negligent in that they were under a duty to supply and erect a staging which was safe to persons using it and/or to provide safe means of access and/or a safe working platform to persons repairing and reconditioning the ship ; and that, in breach of that duty and/or negligently, they supplied a staging which was unsafe and/or did not provide a safe means of access and/or a safe working platform. Among the particulars they included an allegation that the defendants ignored complaints by those working on the staging that it was dangerous and inadequate. The defendants denied the plaintiff's allegations, and pleaded that such injuries as the plaintiff sustained were occasioned, or, alternatively, were contributed to, by negligence on his part. There was no plea of volenti non fit injuria. Lynskey J. gave judgment for the defendants. He was of opinion that there was no unusual danger in so far as the plaintiff was concerned and that there was no breach of duty on the part of the defendants. He added that, if it had been necessary, he would have held that the plaintiff freely and voluntarily impliedly agreed to accept the risk of working on the staging with full knowledge of the nature and extent of the risk which he ran.

Before the trial judge the plaintiff's case was put on the footing of the duty owed by an invitor to an invitee. On the hearing of the appeal Mr. Edgedale was inclined to put the

C. A.

1949

HORTON v. LONDON GRAVING DOCK CO. LD.

Singleton L.J.

case on a somewhat wider basis, though his main argument was directed towards showing that Lynskey J. was wrong in his statement of the position on the assumption that the defendants were to be regarded as invitors and the plaintiff as an invitee. I propose to consider first the arguments based on "invitor" and "invitee." The judge said that it was clear that the defendants owed to the plaintiff the duties which an invitor owes to an invitee. This involves a close examination of the nature of the duty as laid down by Willes J. in *Indermaur* v. *Dames* (1). The words of Willes J. were these: "And, with respect to such a visitor at least, we "consider it settled law, that he, using reasonable care on "his part for his own safety, is entitled to expect that the "occupier shall on his part use reasonable care to prevent "damage from unusual danger which he knows or ought to "know; and that where there is evidence of neglect, the "question whether such reasonable care has been taken by "notice, lighting, guarding or otherwise, and whether there "was contributory negligence in the sufferer must be determined by a jury as a matter of fact." The rule there stated ends with the words "knows or ought to know." The words which follow are an indication of some of the ways in which a defendant may escape liability: for example, by giving notice of the danger, or by lighting, guarding or otherwise; and, of course, contributory negligence was a complete answer at that time. In such circumstances it is a question of fact whether reasonable care has been taken, and notice is an element which has to be taken into consideration.

The first difficulty arises from the words "unusual danger." The submission of Mr. Everett, on behalf of the defendants, was that "unusual" in this context means "unexpected by "the plaintiff," and that, if the danger was known to him, it could not be an unusual danger, from which it would follow that there was no liability on the defendants. This submission met with the approval of Lynskey J., who, citing the judgment of Phillimore L.J. in *Norman* v. *Great Western Railway Company* (2), said: "In my view 'unusual danger' "means a danger unusual from the point of view of the par"ticular invitee," and, later, "It must be, from his point of "view, unexpected in the particular circumstances in which "he is availing himself of the invitation." With respect,

(1) L. R. 1 C. P. 274, 285, 287, 288.

(2) [1915] 1 K. B. 584, 596.

C. A.

1949

HORTON
v.
LONDON
GRAVING
DOCK
CO. LD.

Singleton L.J.

I do not regard this as the test in every case. "Unusual" may be defined as: "Not usual; uncommon; exceptional." It indicates the kind of thing which would not normally be expected. The danger created by the staging was through its being insufficient, and the danger was an unusual one in that it was of a kind not usually encountered. The plaintiff was an experienced welder, 67 years of age, and he and others complained of the insufficiency of the staging. A danger which is unusual does not become other than unusual merely because the person suing knew of it before his accident. If it were otherwise, notice of an unusual danger might of itself render the rule in *Indermaur* v. *Dames* (1) wholly inapplicable, whereas notice is only an element to be considered. In the case of an invitee it is not necessary to show a concealed or a hidden danger, as it is in the case of a licensee. In this respect I think that the reference by Lord Maugham to a hidden danger in *Griffiths* v. *Smith* (2), was a slip; and in any event the duty towards an invitee was not being considered in that case.

The next question is whether knowledge by the plaintiff of the danger prevents him from recovering damages. Sir Percy Winfield in his book on the Law of Tort (4th ed.) p. 562, refers to the two different interpretations which have been put upon the rule in *Indermaur* v. *Dames* (1): (*a*) the occupier must take reasonable care to make the structure safe; (*b*) the occupier need only ascertain the existence of dangers and either remove them or give adequate warning of their existence. He speaks of this as arising from an ambiguity in the terms of the rule. The submission on behalf of the defendants was that, as the plaintiff knew of the danger, there was no need for them to give him any notice and he could not recover, for he was in the same position as one to whom notice had been given. I am not sure that there is any ambiguity in the rule as stated by Willes J., if, as I think, the rule itself ends with the words "knows or ought to know" and the words which follow are regarded as indicating possible defences. Once there is evidence of neglect—and I think it clear that there was, on the judge's finding as to the staging—it is a question of fact whether notice given is sufficient to absolve the occupier from liability. I agree that one who has knowledge of the danger may well be treated as though he had been given notice of it. Whether the notice (or knowledge)

(1) L. R. 1 C. P. 274.

(2) [1941] A. C. 170, 182.

is sufficient to absolve the occupier must depend on a variety of circumstances, including the nature of the risk and the position of the injured party. If a veterinary surgeon is called to a farm at night time to attend to a sick animal and the farmer tells him : " Be careful how you go down the yard " or you may fall into a tank," and, in spite of every care, the veterinary surgeon meets with an accident through an unusual danger, though of the kind envisaged, he may be entitled to recover notwithstanding the warning or notice. On the other hand, if a shopkeeper says to a customer some such words as : " Do not go to the far side of the shop ; there " is a hole there and it is dangerous," and the customer disregards the warning and thereby meets with an accident, it is unlikely that he could recover even if he would be regarded as an invitee at that spot.

The plaintiff was employed to work on this staging. He had pointed out that it was insufficiently constructed. No doubt he hoped that he would be able to carry on safely; and perhaps he thought that the defendants would put the staging into a better condition. It was his duty to get on with the work. He was entitled to rely on the defendants' chargehand's promise that something would be done. There is no finding of contributory negligence against the plaintiff, and it must be assumed that at the time of his accident he was taking every care of himself, and that the accident took place because of the insufficiency of the staging. Can it be said that reasonable care was taken " by notice . . . . or otherwise," so that the defendants are relieved from responsibility ? In fact, they did nothing. I do not regard knowledge on the part of the plaintiff as an answer to the claim unless it can be shown, not only that he realized the extent of the risk, but also that he freely and voluntarily undertook it—in other words, that the defence of volenti non fit injuria applies : See *Letang* v. *Ottawa Electric Railway Company* (1). I do not know how far volenti as a defence was considered in the court of first instance. It was argued on the appeal, and I had not then noticed that it was not raised by the defence as pleaded. We were referred to *Bowater* v. *Rowley Regis Corporation* (2), in which it was said that the defence of volenti could seldom apply when the plaintiff was a servant of the defendants. It is difficult to see any real difference in principle between that case and this, for, though here the plaintiff was not a servant of the defendants, he was

(1) [1926] A. C. 725.

(2) [1944] K. B. 476.

C. A.

1949

HORTON v. LONDON GRAVING DOCK CO. LD.

Singleton L.J.

a servant of a sub-contractor and was working alongside the defendants' employees. He had complained to the defendants' charge-hand, who had promised to do the best he could but who in fact did nothing. The defence of volenti ought not to prevail against a workman who has complained but who thinks it right to get on with his work as best he can and as carefully as he can, especially if there be a promise on behalf of the occupiers to put the matter right or to do "the best "I can."

It remains for me to consider the other ground on which the plaintiff's claim is put. It was said that, as the defendants knew that the staging was to be used by the sub-contractors' men, of whom the plaintiff was one, they were under a duty to him to exercise reasonable care in regard to it. It seems to me that this is a much better way of putting the position than by regarding it as merely the case of an invitor and an invitee. There has been much criticism of the words of Brett M.R. in *Heaven* v. *Pender* (1): "The proposition which "these recognized cases suggest, and which is, therefore, to "be deduced from them, is that whenever one person is by "circumstances placed in such a position with regard to "another that everyone of ordinary sense who did think would "at once recognize that if he did not use ordinary care and skill "in his own conduct with regard to those circumstances he "would cause danger of injury to the person or property of the "other, a duty arises to use ordinary care and skill to avoid "such danger."

In *Donoghue* v. *Stevenson* (2), Lord Atkin said of this passage: "As framed, it was demonstrably too wide, though it appears "to me, if properly limited, to be capable of affording a valuable "practical guide." He adds: "You just take reasonable "care to avoid acts or omissions which you can reason-"ably foresee would be likely to injure your neighbour. "Who, then, in law is my neighbour? The answer seems "to be: persons who are so closely and directly affected "by my act that I ought reasonably to have them in "contemplation as being so affected when I am directing "my mind to the acts or omissions which are called "in question. This appears to me to be the doctrine of "*Heaven* v. *Pender* (1) as laid down by Lord Esher (then Sir "William Brett M.R.), when it is limited by the notion of

(1) 11 Q. B. D. 503, 509.

(2) [1932] A. C. 562, 580.

"proximity introduced by Lord Esher himself and A. L. Smith "L.J., in *Le Lievre* v. *Gould* (1)." After citing extracts from those judgments Lord Atkin continued: "I think that this "sufficiently states the truth if proximity be not confined to "mere physical proximity, but be used, as I think it was "intended, to extend to such close and direct relations that "the act complained of directly affects a person whom the "person alleged to be bound to take care would know would "be directly affected by his careless act."

The defendants were the main contractors, and they were fully aware of the purposes for which they erected the staging and, in particular, that it was to be used by sub-contractors' workmen. Applying the words of Brett M.R. in *Heaven* v. *Pender* (2), as explained and modified by himself in *Le Lievre* v. *Gould* (1) and by Lord Atkin in *Donoghue* v. *Stevenson* (3), I consider that the defendants were under a duty towards the plaintiff to use ordinary care and skill in the erection of the staging, and that they failed in the performance of that duty. The defendants owed to their own workmen a duty to use due care and skill to provide proper plant and appliances. If an accident had occurred to one of their own men through this defective staging, it seems to me that, apart from questions such as contributory negligence, they would have been responsible in damages, and I fail to see why the position should be different in the case of sub-contractors' men, for whose use, also, the staging was erected by the defendants. In truth there would not appear to be a great deal of difference between this aspect of the case and that of invitor and invitee, if the view which I have expressed of the rule in *Indermaur* v. *Dames* (4) is correct. In *Addie (Robert) & Sons (Collieries), Ld.* v. *Dumbreck* (5), Lord Hailsham L.C. said of invitees: "Towards "such persons the occupier has the duty of taking reasonable "care that the premises are safe." That was a shorter way of expressing the law, and it omitted that part of the words of Willes J., which indicates what may provide a defence when there is evidence of neglect on the part of the occupier. The judge found that the staging was as described by the plaintiff and his witnesses. The defendants' charge-hand shipwright admitted that the staging would be dangerous if it was as they had described it. Another of the defendants'

(1) [1893] 1 Q. B. 491.
(2) 11 Q. B. D. 503, 509.
(3) [1932] A. C. 562, 580,
(4) L. R. 1 C. P. 274.
(5) [1929] A.C. 358.

C. A.

1949

HORTON
v.
LONDON
GRAVING
DOCK
CO. LD.

Singleton L.J.

witnesses agreed that the staging was quite unsafe for welders, and he said that there were complaints every day about the staging. Clearly there was evidence of neglect on the part of the defendants, and I do not see anything in the evidence which can excuse them from liability, unless it can be said that the plaintiff freely and voluntarily undertook the risk. For the reasons given, I do not think that that avails the defendants in the circumstances of this case. I would allow the appeal and order that judgment be entered for the plaintiff with damages to be assessed.

TUCKER L.J. This case appears to me to require us to decide a matter which has been much debated by the writers of text-books, namely, the alleged ambiguity of the rule in *Indermaur* v. *Dames* (1). Does that rule require the occupier to take reasonable care to make the premises or structure reasonably safe for the purposes for which the invitee is invited thereto, or is the occupier's duty confined to taking reasonable care to prevent accidents from arising from unusual dangers, of which he is or ought to be aware, so that, if the danger is known to the injured person as a result of notice or otherwise, he is precluded from recovering? It does not appear that in the long history of cases concerning invitors and invitees it has ever been necessary to the actual decision to answer this question. There have been numerous dicta either way. In *Hillen* v. *I.C.I.* (*Alkali*), *Ld.* (2), Scrutton L.J. refers to the conflict of opinion on the point in these words: "It is unnecessary in this case to discuss whether that obligation is to use reasonable care to see that the premises are reasonably safe, as was held by the Court of Appeal in *Norman* v. *Great Western Railway Company* (3), or merely to give warning of a trap, the generally accepted view of Willes J.'s judgment in *Indermaur* v. *Dames* (1), as stated by Lord Atkinson in *Cavalier* v. *Pope* (4), and held by the Court of Appeal in *Brackley* v. *Midland Railway Company* (5). On this point see Salmond on Torts (7th ed.), pp. 462–464, and Pollock on Torts (13th ed.), p. 533, note (*f*)." He evidently regarded it as open to this court to adopt either view, and nothing has occurred subsequently to alter the position. In 1929 Lord Hailsham in *Addie* (*Robert*) *& Sons* (*Collieries*), *Ld.*

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(1) L. R. 1 C. P. 274.
(2) [1934] 1 K. B. 455, 465.
(3) [1915] 1 K. B. 584.
(4) [1906] A. C. 432.
(5) 85 L. J. (K. B.) 1596.

v. *Dumbreck* (1) had said: "The duty which rests upon the "occupier of premises towards the persons who come on such "premises differs according to the category into which the "visitor falls. The highest duty exists towards those persons "who fall into the first category"—that is to say, as he had previously indicated, people who go by invitation, express or implied, of the occupier; that is the first category—"and who "are present by the invitation of the occupier. Towards "such persons the occupier has the duty of taking reasonable "care that the premises are safe."

Since that date, and since the observations of Scrutton L.J., Slesser L.J. in *Weigall* v. *Westminster Hospital* (2), has cited the passage from Lord Hailsham's speech which I have just read, and Scott and Goddard L.JJ. in *Haseldine* v. *Daw* (3), have stated the duty as follows:—Scott L.J. said (4): "On "the scope of the occupier's duty to an invitee at common law "there is to-day general agreement, except on one aspect, "and if the plaintiff was, as I think, an invitee, the liability "of the landlord to him as his invitee turns on that very point. "Is it his duty to provide 'reasonably safe premises,' or only "to 'take reasonable care' to ensure that his premises shall "be safe? The former standard is higher than the latter, "'a limited duty of insurance, as one may call it' (Pollock "on Torts (14th ed.), p. 406) and, it has been suggested, may "involve responsibility for the act of an independent con- "tractor. In Winfield on Torts, p. 581, note *d*, there are "some judicial expressions to the former effect, but I do not "know of any case where the point has been the ratio decidendi. "In *Indermaur* v. *Dames* (5), Willes J. expressed it as a duty "of care only, and I cannot see how on principle it can be put "any higher." Goddard L.J. used these words (6): "But "even assuming that the plaintiff is to be regarded as an "invitee, I think that his claim must fail. Towards an "invitee the occupier has the duty of taking care that the "premises are reasonably safe."

I find in Halsbury's Laws of England (2nd ed.), vol. 23, p. 604, where all the authorities are referred to, that the law is summarized as follows: "The duty of the occupier of premises on "which the invitee comes is to take reasonable care that the "premises are safe and to prevent injury to the invitee from

(1) [1929] A. C. 364.
(2) (1936) 52 T. L. R. 301.
(3) [1941] 2 K. B. 343.
(4) Ibid. 353.
(5) L. R. 1 C. P. 274.
(6) [1941] 2 K. B. 343, 374.

"unusual dangers, which are more or less hidden, of whose "existence the occupier is aware or ought to be aware; or, in "other words, to have the premises reasonably safe for the use "that is to be made of them." As this way of stating the duty appears to me to be apt to cover all the infinite variations of facts and circumstances which may exist in these cases, and to meet the plain requirements of justice, I would be disposed to adopt it as a correct and comprehensive statement of the duty, unless I am compelled by authority to reject it.

The only reason to the contrary of which I am aware is that the precise language of Willes J. in *Indermaur* v. *Dames* (1) has so often been quoted as correctly stating the whole duty that is owed by the invitor in such cases that it may be said to have become part of our law. I venture to think, however, that, as in every other case, the precise language used must be considered in relation to the particular facts which required decision.

In that case there was a hole in the floor of the premises, not due to any defect, but necessary to the operations being carried on on the premises. The plaintiff had been cautioned in these terms (1): "Now, mind, Indermaur, sugar-houses "are very peculiar places: they neither allow candles nor "lucifers. We must keep our eyes open. There is a man "to go with us with a light. I shall follow the man; and you "keep close to me." The existence of the hole was well known to the regular employees on the premises, but it was unknown to the plaintiff, who was working for a contractor. To him it was an unusual danger; to the regular employees it was a familiar feature of the premises. In directing the jury, Erle C.J. used this language (2): "The plaintiff has to "establish that there was negligence on the part of the "defendant; that the premises of the defendant, to which "he was sent in the course of his business as a gas-fitter, were "in a dangerous state; and that, as between himself and the "defendant, there was a want of due and proper precaution "in respect of the hole in the floor. To my mind, there would "not be the least symptom of want of due care as between "the defendant and a person (permanently) employed on "his premises, because the sugar-baking business requires "a lift on the premises, which must be as well known to the "persons employed there as the top of a staircase in every "dwelling-house. But that which may be no negligence

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(1) L.R. 1 C.P. 274.

(2) Ibid. 276, 277.

"towards men ordinarily employed upon the premises, may be "negligence towards strangers lawfully coming upon the "premises in the course of their business." It was in this connexion that Willes J. laid down what he stated was at least the duty owed by the invitors. I do not read it as purporting to be a comprehensive statement covering all cases, and I regard it as a good example of the application of the duty to take reasonable care to make the premises reasonably safe, expressed in terms appropriate to the facts of the case.

It would, I think, be strange and unfortunate if our law allowed an occupier, who has supplied gear or equipment for immediate use by those whom he has invited to his premises without having taken reasonable care to see that such gear or equipment is reasonably safe, to escape liability in whole or in part, unless he proves contributory negligence or establishes a plea of volenti non fit injuria. In the present case contributory negligence has not been found and on the facts proved was clearly not established. Volenti was not pleaded and, although it depends in every case on questions of fact, I am clearly of opinion that the facts proved went no further than to establish scienti, there being no material distinction between this case and that of master and servant. For these reasons I agree that the appeal succeeds.

JENKINS L.J.: I agree with the conclusion at which my Lords have arrived. The degree of care owed by the defendants as invitors to the plaintiff as invitee must obviously be assessed with reference to the circumstances of the particular case. The relevant circumstances, as I understand them, were these: the plaintiff's employers had sub-contracted with the defendants to do certain welding work on the ship which the defendants were reconditioning as head contractors. The relevant part of this work involved the use of staging, and the contract was entered into on the customary basis that the defendants would provide the requisite staging, and that the sub-contractors or their employees would not interfere with the staging so provided, but would report any deficiencies to the defendants' shipwrights for attention. The position as regards the welding work in the hold, in the course of which the plaintiff was injured, therefore was that the staging from which the sub-contractors' employees had to work was provided by the defendants and under their exclusive control as regards any additions or alterations required to make it adequate for the purpose.

C. A.

1949

HORTON
v.
LONDON
GRAVING
DOCK
CO. LD.

Jenkins L.J.

I think it follows that, in inviting the sub-contractors' employees, including the plaintiff, into the hold for the purpose of doing the work contracted for from the staging so provided and controlled by the defendants, the latter assumed a duty towards the former to ensure that the staging was reasonably safe for the purpose for which it was to be used. If one of the planks had been rotten and had broken under the plaintiff, or if the staging had been insecurely supported and had collapsed under him, he would clearly have been entitled to recover both on the narrowest construction of the definition of the duty of invitors to invitees as stated in *Indermaur* v. *Dames* (1), and applied in so many subsequent cases to an almost infinite variety of facts, and also on the principle that a person who provides defective gear for a given purpose is liable to the person for whose use it is provided if the latter sustains injury through the defect, even though the person supplying the gear is not the employer of or otherwise contractually related to the person injured : see *Heaven* v. *Pender* (2) as explained in *Donoghue* v. *Stevenson* (3), and *Oliver* v. *Saddler and Company* (4).

Does it make any difference that the defect actually in question lay, not in any unsoundness or insecurity in the members or construction of the staging, but in its inadequacy in the respects that the four planks provided and the transverse irons on which they rested were so narrow, and the planks were placed so far apart, that anyone attempting to cross, or to pass tools, from one plank to the next was likely sooner or later to slip and fall ? The defendants claim that this does make all the difference. The staging, they say in effect, was plain to see for what it was, and no more and no less dangerous than it actually appeared to be ; the danger was obvious, and, if the plaintiff chose to use the staging, he did so at his own risk.

I think that this argument involves an undue restriction on the duty owed by the defendants to the plaintiff in the circumstances of the case. It was their business to provide the staging, and, in using it as provided for the purposes of the work contracted for, the plaintiff was doing the very thing that they invited him to do. It was also their business (and this I regard as a decisive element in the case) to make good any deficiencies in the staging, which the plaintiff was not entitled to supplement or rearrange in any way. The staging,

(1) L. R. 1 C. P. 274.

(2) 11 Q. B. D. 503.

(3) [1932] A. C. 562.

(4) [1929] A. C. 584.

to be reasonably safe for the purpose in hand, had to be safe, not merely for a person using reasonable care to walk across or stand on, but for a person using reasonable care to work from and move about on, with his tools and so forth, in the course of welding operations of the kind contracted for. The degree of risk which the use of the staging as provided would be likely to involve in the various situations liable to arise in the course of the work would not be easy to assess in advance. It would no doubt have been theoretically possible for the plaintiff to refuse to work from the staging until it had been improved to his satisfaction, but the mere fact that he did not so refuse clearly did not suffice to bring him within the principle of volenti non fit injuria : see *Letang* v. *Ottawa Electric Railway Company* (1)). The defendants must obviously be regarded as having known of the inadequacy of the staging as erected by their own employees ; but, quite apart from this, the evidence shows that the plaintiff and his workmates complained to the defendants' employees of its inadequacy and that these complaints were ignored.

The defendants' position therefore comes to this : it was their business to provide staging for the sub-contractors' employees to work from. They provided inadequate staging. It was also the defendants' business to make good any deficiencies in the staging. Complaints of the inadequacy of the staging were made to their employees and ignored. The plaintiff, using, in accordance with the defendants' invitation, the only staging that they thought fit to provide, slipped and was injured, without any negligence on his part, owing to the inadequacy of the staging provided. The plaintiff claiming damages, the defendants say in effect : we are not liable ; the accident was your own fault ; true, the staging which we provided and invited you to use was inadequate and our employees did nothing when complaints about it were made ; but after all you could have refused to use the staging and stopped work until we provided something better. This position seems to me to be wholly untenable. For these reasons, I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for the plaintiff : *Shaen, Roscoe & Co.*
Solicitors for the defendants : *Carpenters.*

A. W. G.

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(1) [1926] A. C. 725.

C. A.

1949
Dec. 16, 20.

Evershed M.R.,
Cohen and
Asquith L.JJ.

LEWIS *v.* THOMAS.

Rights of way—Use for upwards of 20 years—Gate across way locked from time to time by tenant—Enjoyment of way "without "interruption"—Meaning—Relevance of interruptor's intention—Rights of Way Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 45), *s.* 1, *sub-s.* 1.

Although such an act as locking a gate across a way which is used as of right by the public prima facie constitutes an interruption of the enjoyment of the way within the meaning of s. 1 of the Rights of Way Act, 1932, and none the less so because during the time while the gate is kept locked no one had happened to try to use the way, the absence of any intention to challenge the right of the public to use the way is material to the question whether there has in fact been any interruption within the meaning of the section.

A track over agricultural land had been used for upwards of forty years by the public as of right as a way for agricultural vehicles and cattle. A tenant of two fields through which the track ran had during that period from time to time locked a gate across it. According to the evidence he had locked the gate at night only and for the purpose of preventing cattle from damaging his corn when it was stacked in one of the fields. He had unlocked the gate each morning. In an action by the owner of land crossed by the track against the defendants for damages for trespass in driving a tractor over the track, the defendants claimed that they were exercising a public right of way. The county court judge found that when the previous tenant had locked the gate it had only been for the purpose of protecting his corn from damage by cattle, and not for the purpose of showing the public at large that there was no right of way over the track. Accordingly, he held that the locking of the gate was not an "interruption" of the exercise of the right of way which would prevent time from running under s. 1 of the Rights of Way Act, 1932.

Held, that, on the evidence as a whole, it was open to the county court judge to find that there had been no interruption in fact of the user of the way by the public, since the locking by the tenant of the gate had been done at such times and in such circumstances as not to be likely to interrupt, and not in fact to have interrupted, the use of the way.

APPEAL from Cardigan county court.

The plaintiff, Eira Marguerite Lewis, was the owner and occupier of the Old Rectory and the adjoining land and buildings at Dinas, Pembroke. The first defendant, William Joseph Thomas, was the owner of land adjoining the plaintiff's land, and George Thomas and Vincent Davies, the second and third defendants, were the tenants of the first defendant.

The plaintiff alleged that the defendants had wrongfully trespassed upon the drive of the Old Rectory with tractors and other vehicles, and had wrongfully driven cattle over it. Further, it was alleged, after the plaintiff had erected a gate at the west entrance to the drive and locked it, the defendants in March, 1949, broke the padlock on the gate and again drove a tractor along the drive. The plaintiff claimed damages and an injunction to restrain the defendants from continuing the acts of which she complained. The defendants in their defence claimed that there was a public right of way for farm vehicles and cattle over the drive and that they were entitled to use it for the purposes complained of.

It appeared from the evidence that the way in question was part of a track which started from a main road. It first passed along two fields, Nos. 142 and 148 on the ordnance survey of the parish, followed the drive of the Old Rectory, subsequently crossing further agricultural land, and ultimately joined the main road again. The track formed a short cut from Soar Hill to Brynheullan. If the track were not used, it would be necessary to make a considerable détour by the main road. It was admitted that there was a right of way for pedestrians over the track.

Originally fields Nos. 142 and 148 had been glebe land and had, with the Old Rectory and other adjoining land, vested in 1914 in the Commissioners of Church Temporalities in Wales, subsequently vesting in the Representative Body for the Church in Wales. During the material period the Old Rectory had been occupied by the rector of the parish, and the two fields had been let to one Reynolds, whose tenancy ended in 1941. In 1942 the Representative Body sold the two fields, and in 1947 the purchaser conveyed them to the first defendant. In 1945 the Old Rectory was sold by the Representative Body to the plaintiff. It appeared from the evidence that while Reynolds was tenant of the two fields he had from time to time locked a gate across the track between them at night in order to prevent cattle from damaging his corn. He had unlocked the gate in the morning. He gave the rector a key to the padlock.

The county court judge dismissed the action, holding that there had been continuous user of the way for over forty years, and that Reynolds had only locked the gate across the track to protect his corn and not to show the public that there was no right of way.

The plaintiff appealed.

E. V. Falk for the plaintiff. Before a public right of way can be acquired under s. 1 of the Rights of Way Act, 1932 (1) two things are required: first, there must be user of the way as of right; secondly, that user must be without interruption: *Merstham Manor Ld.* v. *Coulsdon and Purley Urban District Council* (2). The plaintiff does not dispute that there was for over fifty years user of this way as of right by agricultural vehicles and for the driving of cattle. The second requirement, however, has not been fulfilled: there has been interruption. In s. 1, "without interruption" must be construed in its ordinary meaning as without any actual physical interruption. The intention of the person who interrupts the user of a way is immaterial: *Jones* v. *Bates* (3). Once the objective test of continuous user for the period laid down in the section is satisfied, the state of mind of the person blocking the way becomes of importance. The tenant, Reynolds, who locked the gate across the way, did it with the knowledge of the rector who was the agent of the freeholders. A right of way cannot be established by showing that, when the freeholder interrupted the way, he had no intention of defeating the public claim: *Moser* v. *Ambleside Urban District Council* (4). That case shows that intention is important in considering the effect of the proviso to the section. Here there is evidence that the rector knew that Reynolds had locked a gate across the way. The intention of Reynolds in locking the gate is immaterial. That intention cannot be attributed to the rector.

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(1) Rights of Way Act, 1932, s. 1, sub-s. 1: "Where "a way, not being of such a "character that user thereof by "the public could not give rise "at common law to any "presumption of dedication, "upon or over any land has "been actually enjoyed by the "public as of right and without "interruption for a full period "of twenty years, such way "shall be deemed to have been "dedicated as a highway unless "there is sufficient evidence that "there was no intention during "that period to dedicate such way, "or unless during such period "of twenty years there was not "at any time any person in "possession of such land capable "of dedicating such way."

Sub-section 2: "Where any "such way has been enjoyed "as aforesaid for a full period "of forty years, such way shall "be deemed conclusively to have "been dedicated as a highway "unless there is sufficient evidence "that there was no intention "during that period to dedicate "such way."

(2) [1937] 2 K. B. 77.

(3) (1938) 158 L. T. 507.

(4) (1925) 89 J. P. 59, 118.

D. E. Evans for the defendants. It is clear from the judgment of Hilbery J. in *Merstham Manor Ld.* v. *Coulsdon and Purley Urban District Council* (1) that an intention to challenge the right of way is an essential ingredient of an interruption of a way. The interruption must have been with the intention of disputing the public right of user. Here the tenant locked the gate for his own convenience. A key was available for anyone who wanted to pass along the way when the gate was locked. This track was used very infrequently. It was only used by a few people, and not by night. There is no evidence that the locking of the gate caused any one in fact to be interrupted. There was evidence here on which the county court judge could hold that the defendants had discharged the onus which was on them. [He referred to *Attorney-General* v. *Dyer* (2), and *Attorney-General* v. *Hemingway* (3).

Falk in reply. It is put against the plaintiff that, whereas there was interruption, there is no evidence that any person was in fact interrupted. If it is not necessary to prove continuous user of the way, it is equally not necessary to prove a continuous interruption.

Cur. adv. vult.

Dec. 20. EVERSHED M.R. This appeal raises a question under s. 1 of the Rights of Way Act, 1932. The plaintiff, who is the owner-occupier of a property known as The Old Rectory, near to the village or town of Brynheullan, has sued three persons for alleged trespass, consisting of the user by them of a way over her property and certain other acts which they did in purported exercise of that right of way.

The answer of the defendants to the claim of trespass was that they were exercising a public right of way for agricultural vehicles and cattle. It is to be noted that, so far as foot passengers are concerned, it is conceded by the plaintiff that there is a public right of way; but the issue has been whether that public right of way extends also to its user for agricultural vehicles and cattle. I understand that other defences were raised; but, so far as this court is concerned, the sole question is whether the finding of the county court judge that there was such a public right of way can stand. The question is

(1) [1937] 2 K. B. 77.

(2) [1947] Ch. 67.

(3) (1916) 81 J. P. 112.

whether facts have been proved sufficient to establish user within the meaning of sub-ss. 1 and 2 of s. 1 of the Act of 1932 as of right and without interruption.

So far as the former of those two conditions is concerned, "as of right," there is, I think, no question but that the witnesses as to user gave evidence that they used the way—and I borrow the well-known formula of Tomlin J., in *Hue* v. *Whiteley* (1)—each "believing himself to be using a public "road" to pass from one highway to another.

The real question is whether, having regard to the facts, there has been user without interruption for the requisite period. The requisite period may be forty years or twenty years, according to whether the case is founded on sub-s. 2 or sub-s. 1. For present purposes, I understand, that does not matter: either there has been interruption sufficient to defeat the claim under either sub-section or there has been no interruption at all.

Prima facie a question of that kind is one of fact for the judge. He saw all the numerous witnesses who came before him. As it is prima facie a matter of fact, therefore, the plaintiff would be out of court were it not for one matter—one sentence in the judgment of the county court judge—around which the whole argument has ranged. The note of the judgment is in two parts: first, there is a note in which the judge says that he delivered an oral ex tempore judgment from the notes which he made during the hearing. The notes, which are then set out, include, among others, the following: "Evidence of witnesses (*a*) plaintiff's witnesses. Reynolds' "evidence as to locking gate is not conclusive. Not locked "as a right. Opened in morning." Then the judge made an additional note, of which the material parts are these. He said: "In this case I was satisfied from the evidence of the "witnesses, especially that given by the defendants' witnesses, "that there had been continuous use of the roadway in question "for over forty years without any attempt to question the "right to use it. . . . I came to the conclusion (and so stated "in my judgment) that, on the few occasions when Reynolds "locked the gate across the road, he did so only when his corn "was stacked near the gate of the field near the roadway in "question and when he had found that people had left his "gate open and consequently cattle wandered into the corn-"field. It was on these occasions and for this purpose only

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(1) [1929] 1 Ch. 440, 445.

" that he locked the gate across the road, and not because he " was endeavouring to show to the public at large that there " was no right of way through the roadway in question."

It is on that particular part of the judge's finding and judgment that the plaintiff founds her argument; for she says that the judge in that passage misdirected himself by holding, in effect, that interruption in fact does not matter if there was no intention by the interrupter to challenge the right. The plaintiff says, first, that that direction is wrong in law and is inconsistent with Hilbery J.'s view in *Merstham Manor Ld.* v. *Coulsdon and Purley Urban District Council* (1), approved by this court in *Jones* v. *Bates* (2), and particularly with Scott L.J.'s judgment in the latter case.

Secondly, the plaintiff argues that in any case Reynolds was only a tenant of these two fields east of the Old Rectory property. What he did was in fact done with the full knowledge of the rector who was living at the Old Rectory and was at that time the agent of the owners of the property. It cannot, the plaintiff argues, be assumed that whatever was in the mind of Reynolds the same thoughts were also in the mind of the rector; and the court could not on any view, it is said, assume that there was no intention on the rector's part to challenge the right of way. [His Lordship recited the facts, and continued:] During the period while Reynolds was a tenant, however, it is clear that on occasions—the judge finds at night only—he did lock a gate which was across the way, not on the Old Rectory property, but on his own property between the two fields. It is that locking, that alleged interruption, which forms the main burden of the argument before us.

As to the second point, namely, that, whatever was in Reynolds' mind, the rector cannot be assumed to have intended no challenge, there is in point of fact no evidence at all that the rector did intend any challenge. In so far as there is any evidence, I should have thought that it was the other way. But, in any case, the gate in question was not on the rector's property. It was not the rector's gate, and therefore this alleged interruption cannot, in my judgment, be laid at the door of the rector at all. He was, in fact, given a key. His interest in the matter was really as a member of the public if he desired himself to pass eastward along this lane from his property to the main road. I do not therefore think that anything turns on the fact that the rector may or may not have had any particular idea in his mind when Reynolds locked the gate.

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(1) [1937] 2 K. B. 77.

(2) 158 L. T. 507.

The real question is the first indicated above. If his judgment means what the plaintiff says, it may well be doubted whether the statement of the judge could be regarded as correct. Prima facie, to my mind " interruption " in these two sub-sections means interruption in fact.

I have already mentioned Scott L.J.'s judgment in *Jones* v. *Bates* (1). I quote this short passage : " The next requirement of the statute, ' without interruption,' means that the " enjoyment of the right must not have been interrupted. " If for the statutory period members of the public have " used the way as of right, and their exercise of that right " has in fact been interrupted, then the statutory consequences " follow." I take that as meaning that, in the mind of the Lord Justice, " interruption " means what it says : it means interruption in fact.

On the other hand, in my judgment the presence or absence of a challenge may well be a relevant circumstance in determining whether in truth there has been interruption in fact. The illustration was given during the course of the argument of a road which was interrupted and entirely blocked by some broken-down vehicle so that nobody could pass along it at all. It is obvious that in such a case no court would hold that there was such an interruption as was intended by the section. In the forming of that conclusion, the circumstances in which the barring of the way took place and the complete absence of any intention to stop anybody from going along it would, I think, be a relevant circumstance.

Reading the evidence and the judge's judgment, I come to the conclusion that he really did no more, in the passage read, than to refer to Reynolds' state of mind as one of the relevant circumstances to be considered, like the occasions and the times when the gate was locked, in arriving at his decision whether there had in fact been interruption.

I agree that a barring, and particularly a deliberate barring, of a way for an appreciable period would not necessarily lose its effect merely because no one happened to try to use the way during that period. But here the only user in controversy is use by farm vehicles and cattle (the use by foot being conceded) ; and such use is very improbable at night. The evidence seems to be that Reynolds, in fact, only locked the gate at certain periods of the year when his corn was stacked, and always saw to it that it was unlocked in the morning.

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(1) 158 L. T. 507, 511.

In all the circumstances, including the considerable evidence of use which the judge heard, I think that it was open to him to find, as he did, " no interruption," and that the locking was done at such times only as would not be likely to interrupt and did not in fact interrupt (as it was not intended to interrupt) the user of the track for farm vehicles and cattle.

I would therefore dismiss the appeal. I would also follow the judge in not attempting to define more precisely the nature and extent of the right and in not making any declaration. It is sufficient that the plaintiff's action fails. The matter would, as between the plaintiff and these defendants and persons deriving title through them, of course, be res judicata ; but the plaintiff might hereafter, if she wished, litigate the matter afresh with other persons, or the Attorney-General, and raise more precisely the exact nature of the public right. That does not call for any decision in this case. I think that the proper course is to affirm the decision of the county court judge in dismissing the plaintiff's action.

COHEN L.J. : I am of the same opinion, and only desire to add a few words on the main issue. To succeed in the defence that there is a public highway, the defendants have to establish, first, enjoyment as of right for the prescribed period and, secondly, no interruption. So far as the first point is concerned, the judge found in their favour. There was ample evidence on which he could so find, and I do not think that his finding as to enjoyment as of right was challenged by Mr. Falk for the plaintiff. The dispute is whether that enjoyment was or was not interrupted. On this point Mr. Falk relied on the evidence of Reynolds, which has already been summarized by the Master of the Rolls. There was no other evidence of interruption, but I should mention that given for the plaintiff by one Harries, who farmed some of the fields in question. He said that he obtained the rector's permission before he drove his cattle along the track. The county court judge held that that evidence did not constitute an interruption. It is with this finding that Mr. Falk quarrels. He says, first, that the evidence of Reynolds, who was not the owner of the land subject to the alleged right of way, cannot be relevant.

There is no direct authority on the point of interruption so far as the Act of 1932 is concerned; but in *Moser* v. *Ambleside Urban District Council* (1), MacKinnon J. had to consider the question of intention under the law as it was before that Act. The question then was whether the evidence justified an inference of dedication. MacKinnon J. said (2): "The other "principle that I think it is as well to bear in mind is this: it "was said, very truly, in the passage of Parke B. in *Poole* v. "*Huskinson* (3), that a single act of interruption by the owner "was of much more weight upon the question of intention "than many acts of enjoyment. If you bear quite clearly "in mind what is meant by an act of interruption by the "owner, if it is an effective act of interruption by the owner— "I mean by the owner himself—and is effective in the sense "that it is acquiesced in, then I agree that a single act is of "very much greater weight than a quantity of evidence of "user by one or other members of the public who may use the "path when the owner is not there and without his knowledge. "The fact that the owner, as is so constantly done, locks the "gates once a year, and that sort of thing, is, or may be, a "periodical intimation by the owner that he is not intending "to dedicate a highway, but it must be an effective act of "interruption; it must be by the owner himself, because if "you have evidence of an attempted interruption which is not "effective in the sense that members of the public resent the "interruption and break down the gate, or whatever it is, and "that defiance of his supposed rights is then acquiesced in by "the owner, or, again, if it is an attempted interruption by "a tenant without the assent or authority of the owner and is "also an interruption that is ineffective and a failure because "the public refuse to acquiesce in it, then, as it seems to me, "such an ineffective interruption, either by the owner or by "the tenant, so far from being proof that there is no dedication, rather works the other way as showing that there has "been an effective dedication." The dedication in that case was affirmed by the Court of Appeal (4). There is no further reference to the matter of intention in the judgment of this court.

It is plain that, where the question is whether or not there was evidence of dedication, first, intention must be relevant and, secondly, the relevant intention must be that of the person presumed to dedicate. But Mr. Falk says that the Act of

(1) 89 J. P. 59.
(2) Ibid. 61.
(3) (1843) 11 M. & W. 827.
(4) 89 J. P. 118.

1932 has made the fact of interruption, if proved, conclusive, unless, to quote the relevant words from sub-ss. 1 and 2 of s. 1 of the Act, " there is sufficient evidence that there was no " intention during that period to dedicate such way." To some extent I agree with Mr. Falk. It seems to me that the reference to interruption in the sub-section is to the fact of an interruption, and that the question of intention is primarily relevant if, and only if, the owner, against whom the right of way is asserted, seeks to prove no intention to dedicate. None the less, intention may be involved in the question whether a particular act is or is not interruption. Thus, padlocking a gate is prima facie an act of interruption; but I doubt whether it could be held to be so if the interrupter fixed on the gate a notice that the key would be found hanging on the gatepost. The question is whether, having regard to the circumstances, the locking of the gate by Reynolds to the extent indicated by his evidence constitutes interruption. The fact that the gate was locked is clearly proved; and it is not proved that any one person while it was locked would find on the gate any information where the key could be obtained. On the other hand, although the rector must be taken to have approved of the affixing of the lock of which he had a key, Reynolds states that the driver of a coal lorry would get a key, presumably from the rectory, and that the gate was normally unlocked. Moreover, there was no evidence of any actual case in which any person seeking to use the way had been interfered with by the erection and locking of the gate. The alleged right of way was in a place where user of it was only likely by farmers and the like in the vicinity, who would know where the key would be. I agree with the Master of the Rolls in reading the evidence as meaning that the gate was only locked at night. In those circumstances, I am not prepared to differ from the view of the county court judge that there was, in the circumstances of this case, no actual interruption of the right of way. That being so, it seems to me to follow that the appeal fails.

ASQUITH L.J. I agree.

Appeal dismissed.

Solicitors: *Rhys Roberts & Co. for Walter L. Williams & Sons, Fishguard.*

Holt, Beevor & Kinsey for W. J. Williams & Davies, Cardigan.

B. A. B.

C. A.

1949
Oct. 19, 20.

Evershed M.R., Denning L.J. and Hodson J.

MITCHELL *v.* BARNES.

SAME *v.* ALLEN.

Landlord and tenant—Rent restriction—Standard rent—Premises altered —Intervening business user—Apportionment—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*a*) (*as amended by Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 1; *sch.* 1), *s.* 12, *sub-s.* 3.

The defendants were the tenants of a dwelling-house which had been divided into two flats. From 1929 until 1935 the house had been let as a single dwelling-house at a rent of 80*l.* a year. In 1935 it was let as offices to the local authority. In 1946 the local authority gave up possession, and the landlord had thereupon carried out certain structural alterations, converting the house into the two separate flats in question. In 1947 the two flats were let at rents of 156*l.* and 130*l.* a year, respectively, to the defendant tenants. In 1948 the present landlord became entitled to the house subject to the two tenancies. In proceedings for determination of the standard rent of the two flats, the county court judge held that the rents properly payable under the Rent Restriction Acts were not those at which the two flats were first let in 1947 but proportionate parts of the original rent of 80*l.* a year paid for the whole house from 1929 onwards, namely, 44*l.* and 36*l.* On appeal by the landlord.

Held, (1.) that the intervening period of business use did not interrupt the operation of s. 12, sub-s. 1 (*a*), of the Act of 1920, as amended, so that the standard rent was properly fixed by reference to the rent (80*l.* a year) at which the whole house "was last let before" September 1, 1939; (2.) that, as neither the whole house nor any part of it was let on September 1, 1939, it was, within the meaning of s. 12, sub-s. 3, of the Act of 1920 "necessary to apportion" the original (standard) rent of the whole house in order to determine the standard rents of the two flats: *Cole* v. *Harris* [1945] K. B. 474, distinguished; and (3.) that the question of change of the identity of a building due to structural alterations was one of fact for the county court judge, and that there was no ground for interfering with his finding that there had been no such change. Dictum of Atkin L.J. in *Sinclair* v. *Powell* [1922] 1 K. B. 393, 407, applied.

APPEAL from Torquay county court.

Before 1929 a house, 25 Totnes Road, Paignton, had been occupied by the owner, and in that year it was let as a whole as a dwelling-house to a tenant at a rent of 80*l.* a year. It

[Reported by JOHN A. GRIFFITHS, Esq., Barrister-at-Law.]

remained so occupied until 1935, when it was let as offices to Paignton Urban District Council, who remained in possession until 1946. During their occupation considerable alterations were made to the house and, on the landlords' regaining possession in 1946, the necessary repairs and decorations were carried out. At the same time certain structural modifications were made: wooden partitions were erected dividing the two top floors from the ground floor and basement, and new sinks and baths were installed as a result of which the house was converted into two separate flats. In 1947 the two flats were let at rents of 156*l.* a year and 130*l.* a year, respectively, to the defendants. In June, 1948, the plaintiff became landlord of the house subject to the two tenancies.

In October, 1948, the tenants ceased to pay rent and the landlord brought proceedings for possession and for determination of the standard rent of the two flats. The county court judge held that, since, by virtue of s. 2 of the Act of 1938, the house had ceased to be governed by the pre-1939 Acts s. 12, sub-s. 1 (*a*) of the Act of 1920, as amended in 1939, applied; and that consequently the rents properly payable under the Rent Restriction Acts were not those at which the two flats were first let in 1947 but proportionate parts of the original rent of 80*l.* a year paid by tenant of the whole house from 1929 onwards.

The landlord appealed.

Alan Campbell for the landlord.

Raymond Stock for the tenants.

The arguments sufficiently appear from the judgment.

Evershed M.R. I will ask Denning L.J. to give the first judgment.

Denning L.J. [after stating the facts]. The landlords say that 156*l.* a year and 130*l.* a year are the proper figures for standard rent; whereas the tenants say the proper figure for the whole house is 80*l.*, being the figure at which it was let in 1929, and that that figure must be apportioned as between the two flats, 44*l.* for one and 36*l.* for the other.

In order to decide this question, the simplest way in the first place is to consider the house as not having had any structural alterations at all, but simply as let in two separate parts. What would the position be then? The first limb of s. 12, sub-s. 1 (*a*) of the Act of 1920 as amended by that of

C. A.

1949

MITCHELL
v.
BARNES.

SAME
v.
ALLEN.

Denning L.J.

1939 defines the standard rent as the rent at which the dwelling-house was let "on September 1, 1939," that is, of course, as a dwelling-house. This house was not so let, so that the first limb of the definition does not apply. I pause here to say that *Cole* v. *Harris* (1) was decided on that very first limb. The flat there in question was let on September 1, 1939, at 22*s*., and that is ample ground for the decision in that case. But it does not apply here because this house was not let as a dwelling-house at all on September 1, 1939. It was then being used for business purposes.

The second limb of the definition goes on: "Where the "dwelling-house was not let on that date the rent at which "it was last let before that date." Were these flats let before September 1, 1939, as a dwelling-house? The answer is Yes; they were let from 1929 to 1935 at 80*l*. a year. True, it was all one dwelling-house then, but that makes no difference because by s. 12, sub-s. 3, where it is necessary to apportion, an apportionment must be made. That means that, when a house previously let as a whole is subsequently let in two parts, the rent is to be apportioned. Any other view would mean that a landlord could, after September 1, 1939, divide any of his houses into two parts and charge what he liked. The Act clearly forbids any such thing. Apart from the question of conversion into flats, therefore, the standard rent of this whole dwelling-house as at September 1, 1939, was 80*l*. a year, and in order to obtain the standard rent of the two separate parts that rent would have to be apportioned. All the cases, such as *Upsons Ld.* v. *Herne* (2) and *Lindop* v. *Quaife* (3), proceed on this principle.

It was suggested that because the premises had been used in the intervening time for business purposes, therefore you could not look back to the 1929–35 letting. Reference was made to *MacMillan & Co., Ld.* v. *Rees* (4), where the point was left open. It seems to me, however, that the fact that the house was on September 1, 1939, let for business purposes is just as irrelevant as if it were empty, or were let furnished, at that time. An intervening period of decontrol does not enable a landlord to charge what he likes on a new letting. He is confined to the rent payable previously for dwelling purposes: see *Davies* v. *Warwick* (5).

(1) [1945] K. B. 474.
(2) [1946] K. B. 591.
(3) [1949] W. N. 77.
(4) [1946] W. N. 88; 62 T. L. R. 331.
(5) [1943] K. B. 329.

This brings me, therefore, to the question of the conversion of the house into flats. If there was a substantial structural alteration so that the old dwelling-house changed its identity, and two new dwelling-houses were in fact created, then, when the old dwelling-house ceased to exist, its standard rent would have fallen with it. On this point the county court judge went and saw the premises himself. He found that all the dilapidations which had happened during the local authority's occupation were made good; and that then, in order to convert the house into two flats, wooden partitions were put in so as to divide the top two floors from the bottom; and new baths and sinks were also put in. He found that there was no change of identity. The question of change of identity is primarily an inference to be drawn by the county court judge. If he has directed himself properly—as he has here—we can only interfere if it is quite plain that he has come to the wrong conclusion. It would be clearly unjust if a landlord, by making one or two comparatively small alterations, for example, by putting in a window or a door, or even a sink, could thereby get rid of the standard rent altogether. On the other hand, if he does a great deal of structural work he ought to be able to charge a new rent. It is a question of degree, and it is primarily for the county court judge. It seems to me that in this case we cannot say that he was so clearly wrong that we can interfere. It is to be noticed that for any improvement or structural alterations, the landlord is entitled under the Acts to an increase in the rent; and that is the real remedy in a case when the house retains its identity.

It has been pointed out to us that there is a new Act of 1949 which, in respect of post-1939 new lettings, enables a rent tribunal to fix a reasonable rent. This means that, even where there is a change of identity, the landlord cannot charge what he likes. The result is that the courts need not shrink so much from a finding of change of identity as they have done in the past. But it is not a ground on which we can interfere in this case. In cases like this, when it is found that there has been no change of identity, there is a standard rent properly applicable to the flats by way of apportionment, and the Act of 1949 does not apply.

In my view, therefore, the appeal should fail.

HODSON J. It has been argued here that the county court judge was wrong in coming to the conclusion that the two flats concerned in this case had not been substantially changed in identity by virtue of the reconstruction which admittedly took place. It has been said that this court has in a number of cases treated that question, which has often arisen, as one of law. I think it clear from the authorities to which our attention has been drawn that that is not so, and that the Court of Appeal has consistently treated the question of reconstruction which is said to change the identity of a house as one of fact. It is only where the court has come to the conclusion that there was really no evidence on which the county court judge could come to the conclusion at which he arrived, or had misdirected himself, that this court has interfered.

The county court judge here, I observe, paid attention to the details of the work which had been done, in particular that part of it which might be termed constructional as opposed to decorative work; and he himself actually went to look at the premises, and then arrived at the conclusion that the amount expended on the work and the work itself were not such as to make it a case in which it could be said that the identity of the premises had been substantially changed. In directing himself on that matter, he referred to the decision of the Court of Appeal in *Sinclair* v. *Powell* (1), and he referred particularly to the well-known passage from Atkin L.J.'s judgment, which has been followed in a number of cases of this class. Atkin L.J. said (2): "If the part of a house was not let as a separate "dwelling in August, 1914, you may show that substantially "in the form in which it now is it existed and was let as part "of a whole house or a larger tenement in August, 1914, and "can get the rent apportioned. But if the part has been "substantially altered so that you cannot fairly predicate "of it that in its present form it was, as part of a whole, let "in 1914, I do not think that apportionment is possible." Applying that language (as, I think it clear, the judge applied it) to the facts of this case, it seems to me impossible to say that this is a case in which this court can interfere by reason of misdirection, any more than it can by reason of the ground that there was no evidence on which the county court judge could come to the conclusion at which he arrived. That seems to be the question of fact on which this case was fought.

On the question of law, it has been argued in this court that the house, having been used for business purposes, was taken out of the Rent Restriction Acts for the purpose of assessing the standard rent when it came under those Acts, that is, when it was let as a dwelling-house in 1947. That matter has been seriously considered by the Court of Appeal in *MacMillan & Co. Ld.* v. *Rees* (1) a case in which Evershed L.J., reading the judgment, left that question open. This gave an opportunity to counsel to argue that the effect of the use of the premises as business premises was to take them out of the Act altogether for this purpose. Yet no argument has been presented which seems to support that view. I think that I am right in saying that counsel was unable to put forward either any authority for the proposition, or any substantial argument which ought to be accepted, to drive the court away from the ordinary construction of s. 12, sub-s. 1 (*a*) of the Act of 1920 as amended by the Act of 1939, which directs how the standard rent is to be arrived at. This house had been let as a dwelling-house in 1929, and it seems to me to be the plain meaning of the sub-section that it was necessary to go back to that letting in order to ascertain the standard rent, and that it matters not whether the house has come out of the Act since 1929, whether by reason of letting for business purposes or by reason of being empty or occupied by the owner, or for any other reason.

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(1) [1922] 1 K. B. 393. (2) Ibid. 407.

A third point taken has, I think, been taken in this court before in reliance on *Cole* v. *Harris* (2). I have nothing to add to what has been said about that case except this: in *Cole* v. *Harris* (2) there was in fact a letting of the flat in existence on September 1, 1939, and that excluded apportionment. In this case there was no letting on September 1, 1939, the critical date, and it is therefore necessary within the meaning of s. 12, sub-s. 3, of the Act of 1920, to go back to find out what the earlier rent was at which the house was let as a dwelling-house. For these reasons, in my opinion, the appeal should be dismissed.

EVERSHED M.R. I agree that this appeal fails, and I will only add a few observations on the point made that user of the premises for business purposes disables the tenant from seeking to found the standard rent on the rent payable on the occasion of a letting as a dwelling-house before that user and, of course, also before September 1, 1939. Reference has been made by Hodson J. to *MacMillan & Co. Ld.* v. *Rees* (1). It appears from the judgment of this court that the point was there advanced and regarded as one of substance; for I see that, in delivering the judgment of the court, I said (1): "Thirdly, it was argued that if there was a user, and therefore "a letting, of the premises as a dwelling-house for the first "four months of the term of the 1938 lease, the premises "were, during the remainder of that term, indubitably used "exclusively for business purposes: with the result that the "premises wholly ceased to exist as a dwelling-house and that "the landlord accordingly cannot now identify the premises "which were let as a dwelling-house to the appellant in 1940 "with the subject-matter of any letting as a dwelling-house "prior to their user for business premises, and cannot therefore "have recourse to any such earlier letting for the purposes "of fixing the standard rent." It is to be observed that it is the last sentence that introduces precisely the standard rent point. At the end of the judgment I said (1): "The "question was stated by Greer L.J. in *Haskins* v. *Lewis* (2) "to be undecided: and it remains undecided today." If, then, there was this gap in the judicial interpretation of these Acts, that gap must now be taken to be filled.

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(1) [1946] W. N. 88; 62 T. L. R. 331.
(2) [1945] K. B. 474.

In *Phillips* v. *Barnett* (3) three dwelling-houses were converted into something structurally quite different, namely, one factory. I do not think that anything in the judgments in that case throws any light on this point. The observation in *Haskins* v. *Lewis* (2) is merely a statement that the point is undecided. I am satisfied from the argument that there is no justification for imposing, merely as a result of use for business premises, such an exclusion of previous letting of the same premises as a dwelling-house. The relevant sub-section of s. 12, sub-s. 1 (*a*) of the Act of 1920 as amended seems to me, as a matter of English, to negative any such view. Certainly I have failed to find any ground for saying that use for business purposes alone, indeed any of the events which may for the time being remove a building from the ambit of the Act, have the effect suggested. For these reasons and those which have been stated by my brethren, both on this point and on *Cole* v. *Harris* (4) and the other points argued, I think that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Church, Rendell, for Eastley & Co., Paignton: Torr & Co., for Almy & Thomas, Torquay.*

(1) 62 T. L. R. 332.
(2) [1931] 2 K. B. 1.
(3) [1922] 1 K. B. 222.
(4) [1945] K. B. 474.

Applied. Solle v. Butcher [1950] 1 K. B. 674

Considered. Stagg v. Brickett [1951] 1 K. B. 648

WELCH *v.* NAGY.

C. A.

1949
Oct. 17, 18;
Nov. 2.

Bucknill, Cohen and Asquith L.JJ.

Landlord and tenant—Rent restriction—Furnished tenancy—Furniture bought by tenant from freeholder during currency of tenancy—Whether character of tenancy changed—Purchase of house by plaintiff—Purported sale to him of furniture by freeholder—Estoppel—Landlord's claim alleging furnished tenancy—Tenant's reliance on Rent Restriction Acts—Jurisdiction of county court.

A tenant in dispute with his landlord is not entitled in one and the same pleading both to invoke the protection of the Rent Restriction Acts and to object to the jurisdiction of the county court because of the amount of the landlord's claim based on the contention that the Acts are not applicable, for by s. 17, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, that court has jurisdiction to entertain any claim or other proceedings arising out of the Act, notwithstanding that, by reason of the amount of the claim, or otherwise, the case would not, but for the section, be within the jurisdiction of the court.

If during the currency of a single lease, which was originally a substantially furnished one, the tenant buys all the furniture, the effect is not, while that lease is still running, to convert the tenancy into an unfurnished one for the purposes of the Rent Restriction Acts. But when a new tenancy supervenes and the position is such that a furnished tenancy is impossible, the court must give effect to the rights which the statutes confer on the tenant. For the parties to a tenancy cannot, by describing (whether by accident or design) what is in fact an unfurnished tenancy as a furnished or substantially furnished one, alter the fact that the furniture is actually the tenant's and that such a tenancy cannot be a furnished or substantially furnished one. To treat a tenant who has erroneously represented his tenancy as a furnished one as estopped from asserting that the furniture is in fact his and denying that the tenancy is a furnished one, would be to confer on the courts by the act of one of the parties a jurisdiction which Parliament has said that they shall not have namely, an untrammelled power to make orders for possession of premises in fact unfurnished and therefore within the protection of the Rent Restriction Acts.

Jozwiak v. *Hierowski* (1948) 64 T.L.R. 322; *Bowness* v. *O'Dwyer* [1948] 2 K.B. 210; *J. F. Stone Lighting and Radio Ld.* v. *Levitt* [1947] A. C. 209, *per* Lord Thankerton at p. 216; and *Maritime Electric Co. Ld.* v. *General Dairies Ld.* [1937] A. C. 610, applied.

APPEAL from Chesham county court.

In July, 1939, the defendant tenant, Dr. Nagy, orally rented from a Mrs. Jacobson, as nominee of her husband, a house called Manor Lodge, Chesham. On October 4 of that year Mrs. Jacobson offered the tenant, by letter, a tenancy of the house furnished for a year from November 1, 1939, to October 31, 1940, at 11*l*. a month, with an option to renew for a year on the same terms. The tenant replied accepting the offer. In July, 1940, the tenant bought the furniture in the house from Jacobson, then his landlord. On August 27, 1940, the plaintiff, Welch, purchased the house from the Jacobsons, and Jacobson purported to sell to him also the furniture in the house, said to have been contained in a list drawn up by the furnishing company which had sold the furniture to Jacobson. On October 25, 1940, when the first year of the tenancy was about to expire, the tenant by letter exercised his option to extend the tenancy for another year "on the same conditions." The letter referred to the house as "the above-mentioned dwelling-house, furnished, "with garden," but in evidence the tenant asserted that he had left the word "furnished" in per incuriam, because, although he had meanwhile bought the furniture, he had adopted the phraseology of his letter of 1939 accepting the original tenancy. On October 30, 1941, when the additional year was about to expire, the tenant, in answer to a written offer from the plaintiff landlord, wrote "confirming our agreement to the continuation of our tenancy for the duration of "the war under the same conditions as up to the present." One of the conditions of the original tenancy had been that the letting was a furnished one, the amount of the furniture being "substantial." The new agreement for the duration of the war was void for uncertainty when made, but was validated ex post facto by the Validation of Wartime Leases Act, 1944.

The new tenancy agreement was made to take effect on November 1, 1941, at a rent of 15*l*. a month, as between the tenant and the plaintiff landlord, and took the place of the tenancy originally granted by the Jacobsons and continued by the tenant's exercise of option in October, 1940. In March, 1946, the landlord by letter notified the tenant that, the war having come to an end, the tenancy should terminate, but that he was prepared to grant a further tenancy at an increased rent. The dispute between the parties as to the ownership of the furniture came to a head in the same year, and the premises were requisitioned by the local authority, to whom the tenant paid the rent. The local authority gave up possession in July, 1948, and on August 20 of the same year the landlord wrote that he was prepared for a continuation of the tenancy for the time being at a rent of 20*l.* a month ; and he asked if the tenant relinquished his claim to the furniture. The tenant replied that he did not, and claimed the protection of the Rent Restriction Acts against the proposed increase of rent.

On September 30, 1948, the landlord issued the plaint in the present action, claiming a declaration that the tenancy constituted between the defendant as tenant and himself as landlord in respect of Manor Lodge was a furnished tenancy and that, in particular, the furniture comprised in that tenancy was that set out in the furnishing company's list.

By way of defence the tenant denied the landlord's claim because he (the landlord) was not the owner of the furniture. He also denied knowledge of the alleged list. At the trial he challenged the jurisdiction of the county court because of the amount of the landlord's claim.

On October 19, 1948, the landlord amended his plea by claiming 90*l.* arrears of rent for the months of June to December, 1946, at the rate of 15*l.* a month.

The county court judge, in a reserved judgment, granted the declaration as prayed by the landlord and awarded 90*l.* for arrears of rent, and costs. He said that by the tenant's letter of October 25, 1940, the plaintiff landlord had been informed that the tenant elected to rent " the above-" mentioned dwelling-house, furnished, with garden " ; that it was a completely unequivocal document and he had not the slightest doubt that the landlord had shaped his whole subsequent course, including the institution of the action, in reliance on that letter among other things ; and that he felt bound to hold that in the circumstances the tenant was estopped from now asserting his own title to the furniture and from disputing that it formed a substantial part of that for which he paid rent.

The tenant appealed.

The tenant appeared in person.

Heathcote-Williams K.C. and *Stephen Murray* for the landlord.

Cur. adv. vult.

Nov. 2. The following judgments were read :

BUCKNILL L.J. [stated the facts in detail and continued :]

On appeal the tenant again raised the point which he had taken below, namely, that the court had no jurisdiction because the total amount of rent due from him to the landlord exceeded 200*l.* at the time when the plaint was issued, and the landlord had not waived the excess of the rent over and above the 90*l.* claimed by him in the action. Mr. Heathcote-Williams, on behalf of the landlord, argued that, even if the original claim was not within the jurisdiction because the value of the furniture was over 100*l.*, the claim for rent which had been added brought the case within the jurisdiction. As regards this point, in my opinion, there was a separate cause of action in respect of each month's rent in this case, and I refer to the statement in the County Court Practice, 1949 (at p. 97), citing *Rentit Ld.* v. *Oaten* (1), and the very careful judgment of Judge Wethered. The judge did not determine this point, but decided that he had jurisdiction because the tenant denied that it was a furnished tenancy and claimed the protection of the Rent Restriction Acts. I agree with the opinion of the judge that a tenant in dispute with his landlord cannot in the same breath invoke those Acts and object to the jurisdiction of the county court, which, by s. 17, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restriction) Act 1920 has jurisdiction to entertain any claim or other proceedings arising out of the Act notwithstanding that, by reason of the amount of the claim or otherwise, the case would not, but for the section, be within the jurisdiction of the county court.

As regards the substance of the appeal, the tenant argued as follows: I. The judge was wrong in holding that the tenant was estopped from now asserting his own title to the furniture and from disputing the proposition that it formed a substantial part of that for which he paid rent. II. The doctrine of estoppel does not apply in a case such as this where a statutory duty is cast upon the court to ascertain whether the Rent Restriction Acts apply to any particular dwelling. III. Even if the tenant's letter of October 25, 1940, referring to the "dwelling-house, furnished," amounted to an estoppel as regards the furniture, that estoppel was not operative at the time when the plaint was issued, because the tenant had during the preceding two years asserted that the furniture belonged to him. IV. The estoppel, if any, created in October,

(1) [1938] L. J. N. C. C. R. 137.

1940, did not apply in 1941 when a new tenancy agreement was entered into, and there was then no reference by the tenant to the house being taken furnished. V. The value of the furniture when the tenancy was granted was such that the judge was wrong in holding in effect that the amount of rent fairly attributable to its use formed a substantial part of the rent: s. 10, sub-s. 1, Rent Restriction Act of 1923.

The first question, as I see it, is whether the doctrine of estoppel applies to the present case. To answer this question, I think, one must first answer the question: did the tenant offer to rent Manor Lodge furnished, with the intention (actual or presumptive), and with the result, of inducing the landlord, on the faith of that statement, to alter his position to his detriment? The judge has held, and I think it a finding of fact, that "the plaintiff landlord shaped his whole subsequent "course, including his institution of this action, in reliance "on (inter alia), the letter of October 25, 1940." There is evidence to support that finding, and I do not think that it can be disturbed in this court.

Then comes the question: what was the intention (actual or presumptive) of the tenant in making this statement? Having regard to the judge's finding that the tenant had bought the furniture from Jacobson before Jacobson purported to sell it to the plaintiff landlord, I think it clear that, when the tenant wrote the letter of October 25, 1940, he never intended to assert that the furniture in the house belonged to Jacobson. There is no evidence, or no clear evidence, that by that time the plaintiff landlord had told him that he had bought the furniture, and no finding to that effect by the judge. But, as the judge pointed out in his judgment, "the "effect of a document is not that which the writer intends, "but that which the document reasonably conveys to the "recipient." I think that these words "house, furnished," must be taken to mean that the furniture in the house did not belong to the tenant but to the landlord.

I do not agree with the conclusion of the judge that the tenant should be taken to have intended to admit, regard being had to the value of the furniture to him, that the amount of rent fairly attributable to its use formed a substantial portion of the whole rent. There is nothing to show that the tenant intended to make any such admission, and I do not think that the use of the word "furnished" should be taken as carrying such a meaning. I think, therefore, that in any case the judge extended the doctrine of estoppel too far, and that the tenant was not estopped from asserting that the furniture did not bring the case within s. 10 of the Act of 1923.

I agree with the judgment of Asquith L.J., which I have had the opportunity of reading, as to the operation of the Rent Restriction Acts upon the doctrine of estoppel. In my opinion, a tenant cannot, by representing himself as tenant under a fully furnished tenancy when the house was in fact let unfurnished (because the only furniture in it was his own) confer on the court an unfettered jurisdiction to make orders for possession under s. 10 of the Act of 1923.

In my opinion, therefore, the judgment should be amended by striking out that part of it which contains the declaration as claimed by the landlord. The result of that will be that the tenant will not be precluded from asserting in any future proceedings by the landlord or his successors in title for an increase of rent beyond the statutory rent, or for possession, that the furniture in the house when the new tenancy agreement was made in 1941, or when the option was exercised in 1940, belonged to him, and that in any case it was not such as to satisfy the test of "substantial" within s. 10 of the Act of 1923. I think that to that extent the appeal should be allowed.

COHEN L.J. I have had the opportunity of reading the judgment which my Lord has just delivered and the judgment which my brother is about to deliver. I agree with the reasons which they give for allowing this appeal to the extent which they indicate, and I have nothing to add of my own.

ASQUITH L.J. I agree that the appeal should be allowed and the declaration asked for refused.

At first I had some difficulty in interpreting the county court judge's findings of fact. On careful examination I think that they resolve themselves into the following: (1.) When the tenant first entered under a "furnished" tenancy in July, 1939, the house contained certain furniture. This furniture was provided by a Mrs. Jacobson, though owned by her husband. Its amount was such that a substantial proportion of the whole rent was attributable to its use, and the house was accordingly outside the protection of the Rent Acts. (2.) In or about July, 1940, the tenant bought all this furniture (except six pieces) from Jacobson. (3.) Later, on August 27, Jacobson (fraudulently) purported to sell this same furniture to the plaintiff landlord, to whom on the same date he sold the house. (4.) This furniture was that inventoried in the furnishing company's list—the list of furniture which Jacobson purported to sell to the plaintiff landlord.

The county court judge accepted the tenant's evidence to the extent that he claimed to have bought certain furniture from Jacobson before Jacobson purported to sell the same furniture to the landlord. He rejected the tenant's evidence so far as he (the tenant) said that the furniture in question was an assortment entirely distinct from that in the company's list —inferior in quantity, quality and value—and was the furniture contained in an inventory compiled by the tenant himself shortly after he entered and produced by him at the trial, notwithstanding that the tenant's evidence on this point was positive, precise and circumstantial. However this may be, it cannot, I think, be suggested of any one of these findings that there was no evidence to support it. They must be accepted ; and if they are it follows that in July, 1940, when the tenant bought the furniture, his tenancy became a de facto unfurnished tenancy, since the only furniture which the house contained was his own. Did it then and there become an unfurnished tenancy de jure, so as to attract the protection of the Rent Restriction Acts ? This is a difficult question. If the tenant's purchase of the furniture did not alter the character de jure of the current tenancy to that of an unfurnished letting, then the tenancy retained, till it terminated, its original character in law of a " substantially furnished " letting. If, however, immediately on the tenant's purchase of the furniture (or, indeed, at any subsequent time before the plaint), his tenancy ceased in law to be a substantially furnished, and became an unfurnished one, then the landlord can succeed, if at all, only by establishing an estoppel.

It is, therefore, a crucial question what effect in law, if any, is to be attributed to the sale of the furniture to the tenant. In my view, if during the currency of a single lease, which is originally a substantially furnished one, the tenant buys all the furniture, the effect is not, while that lease is still on foot, to convert the tenancy into an unfurnished one for the purposes of the Rent Acts. No direct authority for this was

C. A.

1949

WELCH
v.
NAGY.

Asquith L.J.

cited to us, but it would seem to be a corollary of the principle on which this court proceeded in *Jozwiak* v. *Hierowski* (1), and *Bowness* v. *O'Dwyer* (2). The problem raised in the first of these cases was whether a rise during the tenancy in the amount of rent, the amount of furniture remaining constant, or an increase in the amount of furniture, the rent remaining constant, could alter the character of the tenancy from substantially furnished to unsubstantially furnished, and vice versa. The Court of Appeal held that it could not, and that the relevant time for ascertaining whether the amount of rent attributable to the use of the furniture was "substantial" was, and remained throughout the tenancy, the time when the tenancy started. (I say "the tenancy" for the court in that case did not accept the contention that there were a succession of tenancies.)

By parity of reasoning, if, as was the case here, the tenancy started as a substantially furnished one, it retained that character so long as it lasted, notwithstanding the sale of the furniture during its currency, and the important question is how long it did last. If it did not last till the plaint was issued, and the lease then on foot was a different one, the question will be whether the tenant was estopped from denying that the lease on foot at the time of the plaint was a substantially furnished lease. The county court judge has held that he was so estopped. Indeed, he holds that the estoppel originated and operated before the lease which was on foot at the time of the plaint was entered into, and continued operative thereafter.

[His Lordship recited the facts and continued :] I think it probable that the original tenancy of July, 1939, endured till October 30, 1941, through the exercise of an option to extend for one year. However that may be, on any view the agreement of October 30, 1941, is a new tenancy distinct from any earlier one. Although it speaks of "continuing" the old tenancy for the duration of the war, it does not derive from any option or other provision contained in the original agreement. The position, therefore, is that the lease under which the tenant held at the time of the plaint (and through its statutory prolongation holds today) was not the original lease, and that this lease was made at a time when the tenant himself owned the furniture which, it is said, he was purporting to rent from the landlord. In 1946 the

(1) (1948) 64 T. L. R. 322.

(2) [1948] 2 K. B. 219.

C. A.
1949
WELCH
v.
NAGY.
Asquith L.J.

tenant at last claims the furniture as his property, which, on the facts found by the judge, it had been since July, 1940. In these circumstances the question is whether the tenant can say, "from October 30, 1941, at least, my tenancy has "been an unfurnished one and since the rateable value was "under 100*l.* a year has been within the protection of the "Rent Acts"; or whether he is precluded by estoppel from saying this. The landlord claims, and the county court judge has held, that the tenant is estopped from doing so.

The suggested estoppel is based on the following circumstances: the landlord, when on August 27, 1940, he purported to buy the furniture from Jacobson, had, of course, no idea that Jacobson had already sold it to the tenant. The tenant, as clearly, did know this, but so acted, it is said, as to induce or confirm in the landlord's mind the belief that the furniture was not his, the tenant's, but the landlord's; and the landlord changed his position on the faith of that belief. The following acts or omissions of the tenant are relied on as constituting a representation inducing or confirming that belief: (1.) at some time in August, 1940, later than the 9th but before the 27th, the landlord and his wife had gone to view Manor Lodge and in the presence of the tenant had checked the furniture on the premises with a list of some sort (it was, in fact, the company's list). The tenant saw this going on but did not inform the landlord that it was not the landlord's but his, the tenant's, furniture. (2.) In the letter of October 25, 1940, the tenant purports to exercise his option "and rent "the above-mentioned dwelling-house furnished, with garden, "under the same conditions as fixed up to the present—for "a further year, till November 1, 1941." This, it is said, is a representation that the furniture in the house (which the landlord and his wife had inspected in August and must have observed to be "substantial") was not the property of the tenant, and was the property of the landlord. (3.) Later, when this extension expired, and the tenant made the agreement contained in the letter of October 30, 1941, for a new tenancy, "for the duration "of the war," he said that it was to be "under the same "conditions" as previously; that was, it was to be a "furnished" lease. This, it is said, further reinforced the belief which the tenant's previous letter had entrenched in the landlord's mind, a belief of which the tenant did nothing to disabuse him till 1946 at the earliest. Meanwhile, it was said that the landlord had acted on this representation to his detriment, inter alia, by not suing Jacobson before Jacobson evanesced some time in the autumn of 1940.

The Rent Restriction Acts compel the courts to treat an unfurnished lease of a dwelling-house within the statutory limits of rateable value in a certain way. They are not to permit more than the standard rent and permitted increases to be charged; nor (except under certain conditions laid down in the Acts) have they jurisdiction to make orders for possession. The court must take these points even if the parties do not raise them, as they go to jurisdiction. The court's power, on the other hand, to make orders for possession in the case of "substantially" furnished leases is left unfettered by the Rent Acts. In my view the parties cannot, by describing (whether by accident or design) what is in fact an unfurnished tenancy as a furnished or substantially furnished one, alter the fact that the furniture is actually the tenant's and that such a tenancy cannot be a furnished or substantially furnished one. To treat the tenant here as estopped from denying that the tenancy is unfurnished when it is in fact unfurnished is to confer on the courts by the act of one of the parties a jurisdiction (namely, an untrammelled power to make orders for possession of premises in fact unfurnished) which Parliament has said that the courts shall not have.

In *J. F. Stone Lighting and Radio Ld.* v. *Levitt* (1), the court entertained a counterclaim which, having regard to s. 12, sub-s. 2 of the Rent Restriction Act of 1920 (which excludes from the protection of the Acts houses let at less than two-thirds of their rateable value), it had no jurisdiction to entertain. It was held that no estoppel by matter of record could arise between the parties. "It is idle," said Lord Thankerton, "to suggest that either estoppel or res "judicata can give the court a jurisdiction under the Rent "Restriction Acts, which the statute says it is not to have." These words seem closely in point. A similar principle was applied by the Privy Council in *Maritime Electric Co. Ld.* v. *General Dairies Ld.* (2), where a statutory company which by mistake had demanded and been paid by a customer over a considerable period only one-tenth of the proper charge for services supplied was held not estopped from claiming the balance: compare also *Anctil* v. *Manufacturers' Life Insurance Co.* (3) and *In re a Bankruptcy Notice* (4). Just

(1) [1947] A. C. 209, 216.
(2) [1937] A. C. 610.
(3) [1899] A. C. 604.
(4) [1924] 2 Ch. 76.

as in general parties are not competent to contract out of the protection of the Acts, see *Barton* v. *Fincham* (1) and *Brown* v. *Draper* (2), where the true facts attract that protection, so here the tenant cannot, in my view, be estopped from proving the true facts, where those facts attract that protection.

By the somewhat artificial rule (based on convenience) laid down in *Jozwiak* v. *Hierowski* (3), when a transfer, or change in the quantity, of the furniture rented takes place during the currency of a lease, regard is had, not to the position at the time of the transfer or change, but to the position at the beginning of the tenancy. But when a new tenancy supervenes I see no reason why the court should not have regard to the actual position as to ownership of the furniture ; and if this is such that a furnished lease (let alone a substantially furnished one) is impossible, the court must give effect to the rights which the statutes confer on a tenant under an unfurnished lease.

Apart from this general principle, I doubt whether in the present case the representation relied on is either unambiguous or a representation of pure fact. It is a representation that the lease is furnished, which may mean furnished to some extent or furnished " substantially " within s. 10 of the Rent Restriction Act of 1923. If it means the latter, it may well be a representation of mixed fact and law, the question what is a substantially furnished lease having been widely canvassed in the courts and forming the subject of decisions by the House of Lords.

In these circumstances I am of opinion that the appeal should be allowed, and the first limb of the declaration refused. I have assumed throughout that the declaration asked for is that the tenancy is not only a furnished tenancy but a substantially furnished one within s. 10 of the Act of 1923. A declaration that it is a furnished tenancy to some unspecified extent would be of no value to a landlord, and would in any case, on the view which I take (namely, that this was a tenancy furnished to no extent), equally have to be refused.

The second limb of the declaration runs as follows : " and " that in particular the furniture comprised in such tenancy " is that set out in the " company's list. This limb should, in my view, also be refused because " such tenancy " must

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(1) [1921] 2 K. B. 291.

(2) [1944] K. B. 309.

(3) 64 T. L. R. 322.

C. A.

1949

WELCH
v.
NAGY.

Asquith L.J.

mean the furnished tenancy referred to in the first limb of the declaration, and there was, according to my view, no such furnished tenancy and no estoppel precluding the tenant from saying so. On the other hand, the judge has found (and there was evidence on which he could find) that the furniture in the house was that in the company's list, and was the tenant's property.

For these reasons I agree that the appeal should be allowed to the extent specified.

Appeal allowed.

Solicitors for the plaintiff landlord: *Spiro and Steele.*

A. W. G.

Affirmed. H.L. [1951] 1 All E.R. 1102.

C. A.

1949
Nov. 24, 25, 28, 29, 30;
Dec. 21.

Tucker, Singleton and Jenkins L.JJ.

HARRISON *v.* NATIONAL COAL BOARD.

Mines—Breach of statutory duty by shotfirer—Mine-worker injured by explosive—Liability of mine-owner or manager—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 86*—General Regulations,* 1913, *made under the Coal Mines Act,* 1911 (*St. R. & O.* 1913, *No.* 748), *reg.* 1*—Explosives in Coal Mines Order,* 1934, *made under s.* 61 *of the Act of* 1911 (*St. R. & O.* 1934, *No.* 6), *arts.* 2 (*e*) *and* 6 (*a*).

Regulation 1 of the General Regulations, 1913, made under s. 86 of the Coal Mines Act, 1911, provides that it shall be the duty of the manager and under-manager of a coal mine " to carry " out and to the best of their ability to enforce " the provisions of every order regulating the use of explosives in mines. By the Explosives in Coal Mines Order, 1934, made under s. 61 of the Act, the manager of a coal mine is required (by art. 6 (*a*)) to appoint in writing competent persons as shot-firers, who alone shall perform the duty of shotfiring; and by art. 2 (*e*) there is imposed on the shot-firer the duty of seeing, before firing a shot, that all persons in the vicinity have taken proper shelter.

The plaintiff, a coal-face worker, who had suffered injury through the admitted failure of a shot-firer to perform his duty under art. 2 (*e*), sued the mine-owners, his employers, for damages, alleging a breach by them of statutory duty. The trial judge dismissed the action, finding that the only breach was of a personal duty by the shot-firer, for which by reason of the doctrine of common employment the employers were not liable. On appeal:

Held, (1.) that the words " carry out " in reg. 1 were not to be construed as imposing on the manager or under-manager a liability for the failure of the shot-firer to perform the duties which were expressly imposed on him by art. 2 (*e*) and (2.) that the latter article imposed no direct obligation on the mine-owner.

The employers therefore had not been guilty of any breach of duty owed by them to the plaintiff.

C. A.

1949

HARRISON *v.* NATIONAL COAL BOARD.

Decision of Jones J. affirmed.

Yelland v. *Powell Duffryn Associated Collieries Ld.* [1941] 1 K. B. 154, discussed and distinguished on both points.

David v. *Britannic Merthyr Coal Co. Ld.* [1909] 2 K. B. 146, considered.

Per curiam: semble, there may be a breach of statutory duty entitling an injured party to damages although the breach in question may not amount to a criminal offence.

APPEAL from Jones J.

On January 27, 1948, the plaintiff, a coal-face contractor, employed in the North Gawber Colliery, Yorkshire, was engaged in driving a drift (road) from the top Haymor seam to the low Haymor seam. The time having arrived when it was necessary to have shots fired to loosen the stone through which the drift was being driven, he sent his son, who was assisting him, to inform the person entrusted on that day with the duty of shot-firing in that part of the mine. The plaintiff had bored three holes in which the shots were to be placed. About half an hour later the shot-firer arrived. The plaintiff, meanwhile, had busied himself in making the necessary arrangements for the firing of the shots by laying down iron sheets called flags, and taking a pony to a place of safety. In those circumstances, while the plaintiff was bending down removing his tools and before he had taken shelter, the shot-firer, who had put in the shots and coupled his shot-firing gear to the detonator wires, turned the key in the battery and caused the shots to be fired, without first ascertaining that the plaintiff had taken proper shelter. In consequence the plaintiff suffered injuries. He brought the present action against the defendants, the National Coal Board, alleging negligence and breach of statutory duty. The action was tried at Leeds Assizes on May 9, 1949, and Jones J. gave judgment for the defendants, holding that there had been no breach of statutory duty by the mine-owners and that the breach was of a personal duty owed by the shot-firer to the plaintiff, for which by reason of the doctrine of common employment the defendants were not liable. The plaintiff appealed.

The case is only reported on the question whether the shot-firer's negligence constituted a breach of statutory duty by the mine-owners or their agents.

Beney K.C. and *McLusky* for the plaintiff. The question is whether, where a breach of the regulations regarding shot-firing is proved, and a mine-worker has been injured in consequence of that breach, he has any right against the mine-owner, the breach being of a regulation intended for the workman's protection. It is submitted that the judge came to an erroneous conclusion. Regulation 1 of the General Regulations, 1913, provides that it shall be the duty of the manager and under-manager of a coal mine "to carry out "and to the best of their ability to enforce" the provisions of every order regulating the use of explosives in mines. The Explosives in Coal Mines Order, 1934, made under s. 61 of the Coal Mines Act, 1911, by art. 6 (*a*) requires the manager to appoint in writing competent persons as shot-firers, who alone shall fire shots; and by art. 2 (*e*) it is provided that the shot-firer, before firing the shot, shall see that all persons in the vicinity have taken proper shelter. The person who fired the shot which caused the plaintiff's injuries has not been called as a witness at the trial, and it is not disputed that he was guilty of negligence. It is submitted that the words "carry out and to the best of their ability enforce" in reg. 1 do impose a statutory duty on the manager and under-manager in respect of shot-firing. In *Yelland* v. *Powell Duffryn Associated Collieries* (1) there had been a breach of reg. 131 (*e*) of the General Regulations by an electrician duly appointed by the manager. That regulation provided that "should "there be a fault in any circuit the part affected shall be "made dead without delay, and shall remain so until the "fault has been remedied." Regulation 117, which prefaces the electricity regulations, says: "It shall be the duty "of the mine-owner, agent and manager to comply with and "enforce the following regulations, and it shall be the duty "of all workmen and persons employed to conduct their work "in accordance with the regulations." The Court of Appeal held that by reason of the electrician's breach of reg. 131 (*e*) the mine-owner had failed to comply with it, though he could not be said to have failed to enforce it. Du Parcq L.J. said: "I find no difficulty in holding that the mine-owner is under "an obligation to comply with reg. 131 (*e*), and that in the "present case the appellants have failed in that duty. The "person immediately responsible for the performance of this "obligation is the electrician, or assistant electrician, who

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(1) [1941] 1 K. B. 154.

" has to be appointed by the manager. His duties are set " out in reg. 131 (*c*) and in my opinion he must be regarded " as the mine-owner's agent to perform those duties—the " agent through whom the owner must act, and in this case " did act. The mine-owner, through the manager, has " entrusted him with the performance of the duty : it follows " that the law attributes to the owner his acts and omissions " for which he is directly responsible." Those words of the Lord Justice, it is contended, apply to the present case. " Carry out " can only have the same meaning as " comply " with." The trial judge appears to have mistaken the test laid down by Du Parcq L.J. and to have considered that because the words " mine-owner " do not appear in reg. 1 and do appear in reg. 117, the reasoning of du Parcq L.J. does not apply to the present case. Clearly some of the articles in the Explosives in Coal Mines Order, 1934, are in general terms and must place a duty on the mine-owner : see art. 5.

[*David* v. *Britannic Merthyr Coal Co.* (1) also relied on.]

Fenwick K.C. and *G. W. Wrangham* for the defendant board. This case, so far as the defence is concerned, depends on the distinction between a statutory duty imposed on the master and a statutory duty imposed on the servant. Unless the duty is imposed directly on the master a breach of that duty by the servant does not make the master liable as for a breach of statutory duty. This is not a case of vicarious duty but one where the duty is explicitly imposed on the employee. Before the court can find the mine-owner liable it must determine that the particular duty of which there is said to have been a breach is one for which, either in terms or by implication, the statute or regulations made under it, make him liable. Regulation 1 of the General Regulations, 1913, must be looked at to ascertain on whom the duty is imposed. The manager and under-manager are " to carry " out and to the best of their ability enforce " the provisions of the Explosives in Coal Mines Order, 1934. The words " carry out " are not sufficient to impose on the manager or mine-owner liability for the shot-firer's failure to perform the duties explicitly imposed on the shot-firer by art. 2 (*e*) of the order. The duty of the manager is merely to appoint a competent person as shot-firer. The decision in *Yelland* v. *Powell Duffryn Associated Collieries Ld.* (2) is distinguishable. In that case the Court of Appeal had to consider reg. 117,

(1) [1909] 2 K. B. 146. (2) [1941] 1 K. B. 154.

under which the mine-owner, agent or manager was bound to "comply with and enforce" the particular regulation of which there had been a breach. There is no reference to the mine-owner in reg. 1.

Cur. adv. vult.

Dec. 21. The following judgments were read:

TUCKER L.J., [after stating the facts, and after holding that the fact that the negligence of the shot-firer was a breach of a statutory duty imposed on him was not sufficient to deprive the defendants of the defence of common employment, continued:] The defence of common employment is, in my view, a complete answer to the plaintiff's claim unless he can establish that there was in addition a direct and absolute obligation on the defendants, or on some servant or agent of theirs, for whose acts or omissions in the course of his employment they are liable and who was not in common employment with the plaintiff.

I will consider first the question whether, on the judge's findings, there was a breach of statutory duty imposed on some person other than the shot-firer. It was argued in this court that there was a breach by the manager and under-manager by virtue of reg. 1 of the General Regulations made under s. 86, sub-s. 1, of the Coal Mines Act, 1911. No such breach was alleged in the statement of claim, but, as the matter was argued before us without objection, I will state my view as to the proper construction of reg. 1 of the General Regulations. The question turns on the meaning of the words "carry out" used in conjunction with the words which follow, namely, "and to the best of their ability enforce." Prima facie, I should have thought that this language envisaged that some provisions of the relevant orders could and must be actually performed by the manager and under-manager, either personally or by some person on their behalf, and that other provisions impose duties on specified persons who are alone qualified and entitled to perform them and as to which the manager and under-manager are required to the best of their ability to enforce the performance. Applying this construction to the duties of a shot-firer, I find that art. 6 (*a*) of the order of 1934 provides: "Competent persons (in this "order called shot-firers) shall be appointed in writing by "the manager for the purpose of firing shots, and no shot "shall be fired except by a shot-firer." Article 2 lays down the procedure to be followed by the shot-firer. He is the only person entitled to carry out those operations, the performance of which is entrusted to him and him alone. Paragraph (*e*), which is now in question, lays down that "the person firing "the shot" shall take certain steps. Only one person can fire the shot, and it seems to me to be straining the use of words to say that it is the duty of the manager and under-manager "to carry out" the provisions of art. 2 (*e*) of the order. They must, no doubt, enforce the performance to the best of their ability; but to say that they must "carry out" something which they are expressly forbidden to do, with the result that they become liable to criminal proceedings for not "carrying out" these provisions, seems to me to produce a result which cannot have been intended by those who framed this order.

Before reaching a final conclusion on this point it is, however, necessary to give careful consideration to the judgment of du Parcq L.J. in *Yelland* v. *Powell Duffryn Associated Collieries Ld.* (1). That case concerned the duties of an electrician under Part III of the Regulations. Regulation 131 (*a*) provides that "No person except an electrician "or a competent person acting under his supervision shall "undertake any work where technical knowledge or experience "is required in order adequately to avoid danger." Regulation 131 (*b*) provides: "An electrician shall be appointed "in writing by the manager to supervise the apparatus." The regulation which had not been complied with in that case was reg. 131 (*e*), which reads as follows: "Should there "be a fault in any circuit the part affected shall be made "dead without delay, and shall remain so until the fault "has been remedied." These regulations are preceded by reg. 117, which says: "It shall be the duty of the mine-owner, "agent and manager to comply with and enforce the following "regulations, and it shall be the duty of all workmen and "persons employed to conduct their work in accordance "with the regulations."

Du Parcq L.J. held that, by reason of the electrician's breach of reg. 131 (*e*), the mine-owner had failed to "comply with" that regulation, but that he could no be said to have failed to enforce it. He said (2): "It "is not necessary to decide whether the owner is bound

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(1) [1941] K. B. 154, 165.

(2) Ibid. 165.

C. A.

1949

HARRISON v. NATIONAL COAL BOARD.

Tucker L.J.

"to 'comply with' every one of the regulations to which "reg. 117 refers. It may be that there are some with which, "from their very nature, it is impossible that the owner "should comply, and that his only duty with regard to these "is to 'enforce' them. Further, it must, I think, be true to say "that a breach of duty by some person who has not been "entrusted by the mine-owner with the performance of the "duty on his behalf, is no evidence of a failure by the owner "to comply with the Act. I find no difficulty, however, in "holding that the mine-owner is under an obligation to "'comply with' reg. 131 (*e*), and that in the present case the "appellants have failed in that duty. The person imme-"diately responsible for the performance of this obligation "is the electrician, or assistant electrician, who has to be "appointed by the manager: see regs. 118 and 131 (*b*). "His duties are set out in reg. 131 (*c*), and in my opinion "he must be regarded as the mine-owner's agent to perform "those duties—the agent through whom the owner must act, "and in this case did act. The mine-owner, through the "manager, has entrusted him with the performance of the "duty: it follows that the law attributes to the owner his "acts and omissions, for which he is directly responsible. "Proof of the facts which were established in this case, in "my opinion, fully supported the pleaded allegation that "the defendants (appellants) failed to comply with the "Electricity Regulations."

In that case the Lord Justice was considering the words "comply with" and not the words "carry out." Furthermore, he was considering those words in a regulation which placed a duty on the mine-owner. MacKinnon L.J. did not in terms refer to reg. 117, but I think that, in reading his judgment, it must always be borne in mind that the respondent's case was mainly based on this regulation. Luxmoore L.J. agreed with the judgments delivered by both the other members of the court, which he evidently did not regard as being in any way conflicting.

There is nothing in this case which impels me to the view that I must construe the words "carry out" as imposing a liability on the manager and under-manager for the shot-firer's failure to perform the duties imposed on him under para. 2 (*e*) of the order of 1934. In this connexion it is perhaps worth observing that du Parcq L.J. himself uses the words "comply "with" in contrast to "carry out" in this passage in his judgment (1): "Even if the mine-owner were a natural "person and not, as in this case, a limited liability company, "he would hardly be able to comply with any of the regulations, "and certainly unable to comply with them all, in the sense "of himself carrying them out, or even in the sense of "constantly seeing to it that they were carried out."

In my view, in order to succeed on this appeal, the plaintiff must satisfy us that art. 2 (*e*) of the order of 1934 imposes a direct and absolute obligation on the mine-owners as well as on the shot-firer. This appears to have been the only issue raised at the trial, and it was put in the forefront of the plaintiff's argument in this court. Jones J. was of opinion that not much assistance was to be gained from *David* v. *Britannic Merthyr Coal Company* (2), decided under the rules contained in s. 49 of the Act of 1887, and that *Yelland's* case (1) was distinguishable as having been decided under reg. 117, which expressly imposed a duty on the mine-owners. He was of opinion, in the circumstances of this case and on the true construction of the material regulations, that there was not a duty on the mine-owners to carry out the provisions of art. 2 (*e*) of the order of 1934, and that there was no breach of statutory duty by them. After due consideration of the arguments advanced by counsel to the contrary, and the authorities cited by him, I have arrived at the same conclusion as Jones J.

The cases principally relied upon were those already referred to, namely, *David's* case (2) and *Yelland's* case (1). It is difficult to derive much assistance from the former. The rule with which it was mainly concerned was r. 12 (*f*) in s. 49 of the Act of 1887, which, so far as material, provided: "No shot shall be fired except by or under the direction of a "competent person appointed by the owner, agent or manager "of the mine." The shot had in fact been fired by two unauthorized persons, though a regular shot-firer had been duly appointed. Section 50 of the Act of 1887 provided: "Every person who contravenes or does not comply with any "of the general rules in this Act, shall be guilty of an offence "against this Act; and in the event of any contravention "of or non-compliance with any of the said general rules "in the case of any mine to which this Act applies, by any "person whomsoever, the owner, agent and manager shall

(1) [1941] 1 K. B. 154, 165. (2) [1909] 2 K. B. 146.

"each be guilty of an offence against this Act, unless he "proves that he had taken all reasonable means, by publishing "and to the best of his power enforcing, the said rules and "regulations for the working of the mine, to prevent such "contravention or non-compliance."

At the trial Channell J. directed the jury that the duty imposed on the mine-owners was, first, to publish the rules and, in the next place, to enforce them to the best of their power; and that, if they did that, they were not liable if one of their servants committed a breach of the rules and another servant was thereby injured. He further directed the jury that the onus was on the plaintiff to prove that the defendants had neglected their duties as laid down above. Lord Cozens-Hardy M.R., in a dissenting judgment, agreed with the direction given by Channell J. Fletcher Moulton L.J. was of opinion that there had been misdirection by the trial judge. He said (1): "I come, "therefore, to the conclusion that ,although every 'offence "'against the Act' for which a penalty is provided undoubtedly "constitutes a breach of a statutory duty, the converse is "not necessarily the case, and there may be statutory duties "under the Act the breach of which is not made an 'offence "'under the Act' so as to be mulcted by a penalty; and "further—a conclusion that has a more direct bearing on the "questions in this action—that statutory defences to pro-"ceedings of a criminal nature in respect of 'offences under "'the Act' are only defences to such proceedings, and are "not statutory defences in civil proceedings based on the "non-performance of the statutory duty. Penalties are not "in lieu of civil liability; they are additional to and inde-"pendent of it. It follows, therefore, that in my opinion "the learned judge misdirected the jury in telling them that "'there is not in this statute an absolute liability upon the "'owners to ensure compliance with these rules by their "'servants, but if they, to the best of their power, do their "'best to enforce these rules, then they are not liable in "'law for damage done by reason of their servants not per-"'forming the rules.' I hold that in the rules which form "part of this Act there are many statutory duties imposed "on the owners of the mines, and that with regard to these "there is no exception to the ordinary rule that civil

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(1) [1909] 2 K. B. 162.

"responsibility follows if these rules are broken and damage "is occasioned to third parties, whether the actual act or "default is due to the owner or his servants or agents."

As I read the judgment of the Lord Justice, he was of opinion that on the facts proved the judge should have directed the jury that liability on the part of the defendants had been established; and I do not know, on this view of the case, what evidence the defendants could call on the new trial in order to escape liability. Buckley L.J. was of opinion that the defendants might escape liability by proving that they had taken all reasonable means to prevent the breach, but that the onus was on them to prove this in order to escape their prima facie liability for breach. On this view a new trial was clearly required. On appeal to the House of Lords, the judgment of the majority of the Court of Appeal was upheld, but Lords Halsbury and Gorell said that they could not agree with some of the reasoning of the judges in the Court of Appeal.

Lord Haldane in *Watkins* v. *Naval Colliery Co. Ld.* (1) explained the order for a new trial in *David* v. *Britannic Merthyr Coal Company* (2) on the ground that a new trial was all that was asked for; but Lord Cozens-Hardy M.R. said (3): "The plaintiff has appealed and claims either "judgment or a new trial on the ground of misdirection." In these circumstances I feel great difficulty in ascertaining what direction the judge was required to give to the jury at the new trial. Was it that indicated by Buckley L.J. or that which is implicit in the judgment of Fletcher Moulton L.J.? It is for this reason that I find difficulty in extracting much assistance from this case. Taking, however, the view most favourable to the plaintiff in the present case, namely, that expressed by Fletcher Moulton L.J., the fact remains that he was construing a totally different rule, namely, one expressed in the words "No shot shall be fired." If I may respectfully say so, I can quite understand the view that these words impose an absolute and inescapable obligation on the mine-owner. Article 2 (*e*) of the Order of 1934 in question in the present case is worded differently: it concerns the steps to be taken by the duly appointed shot-firer before he fires the shot. He "shall see that all persons in the vicinity have "taken proper shelter." This is an obligation expressly

(1) [1912] A. C. 693, 703.
(2) [1909] 2 K. B. 146.
(3) Ibid. 152.

imposed on him, he being the only person who is permitted to fire the shot. I cannot read this provision as imposing a direct and absolute obligation on the mine-owner, whether he be a natural person or a corporate body, which can only act by an agent. I agree with Jones J. that reg. 117, which formed the basis of du Parcq L.J.'s judgment in *Yelland* v. *Powell Duffryn Associated Collieries Ld.* (1), and which must, I think, have been present throughout to the mind of MacKinnon L.J. (though not expressly mentioned), distinguishes that case from the present. I feel that it would be straining the language of the order of 1934 and the regulations of 1913 to decide in the present case that there was an absolute and direct obligation on the mine-owners, and so provide an escape from the consequences of the doctrine of common employment, which at the date of this accident precluded the plaintiff from recovering damages for the admitted negligence and breach of statutory duty by the shot-firer, for which, but for this doctrine, the defendants would have been clearly liable.

As I am of opinion, for the reasons stated above, that the defendants are not liable to the plaintiff, it is not necessary to this judgment to decide whether they could have succeeded on the ground that their civil liability is to be measured in terms of their criminal liability under s. 90. As to this there have been conflicting dicta of high authority with regard to these provisions and similar provisions in other statutes. On the one hand, Buckley L.J. and Lord Cozens-Hardy M.R. in *David's* case (2) and Lord Kinnear in *Black* v. *Fife Coal Co. Ld.* (3), and Lord Atkinson in *Watkins* v. *Naval Colliery Co. Ld.* (4), all took the view that a defence available in criminal proceedings would also afford an answer to civil proceedings. On the other hand, Fletcher Moulton L.J. in *David's* case (5), du Parcq L.J. in *Yelland's* case (1), and Lords Thankerton, Wright and Porter in *Potts* v. *Reid* (6), which was a case under the Factories Act, took the contrary view, that provisions with regard to criminal liability and containing no reference to civil liability do not affect the existence of a contravention of the Act or regulations giving rise to civil liability. Notwithstanding this difference of opinion, and recognizing that such questions must in every case depend on the precise language of the statute in question, I have no hesitation in saying that, had it been necessary, I should have accepted the view expressed by du Parcq L.J. in *Yelland's* case (1) in relation to the Act now in question and the reasoning of Lord Porter in *Potts* v. *Reid* (1). For the reasons stated above, I would dismiss this appeal.

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(1) [1941] 1 K. B. 154.
(2) [1909] 2 K. B. 146.
(3) [1912] A. C. 149.
(4) [1912] A. C. 693, 703.
(5) [1909] 2 K. B. 152.
(6) [1943] A. C. 1.

I desire to add that in cases such as this, which involve difficult questions of law and are likely to be taken to appeal, it is always desirable that the trial judge, whether or not he is specifically requested by counsel so to do, should assess the damages provisionally if his decision is adverse to the plaintiff. Failure to do so frequently results in unnecessary further expense to the parties.

SINGLETON L.J. I agree.

JENKINS L.J. I agree. Accepting the evidence of the agent, manager and under-manager of the mine, the judge found that all precautions had been taken by the officials of the mine that shot-firing in the mine should be carried out with care; and he further found that the defendant board adopted all reasonable means, by publishing the regulations, to enforce this and secure compliance with them. This finding, as I understand it, has the effect of absolving the defendant board, and also their agent, manager and under-manager, from being guilty of an offence under s. 75, or alternatively s. 90, of the Coal Mines Act, 1911, by reason of the shot-firer's contravention of, or failure to comply with, the Explosives in Coal Mines Order, 1934. If, on the facts, the defendant board had been guilty of an offence under either of those sections, it would no doubt have followed that the plaintiff would have been entitled to recover damages from the board on the ground that the offence constituted a breach of statutory duty by which he had been injured. On the other hand, I agree with my Lord that the absence of any offence involving criminal liability does not conclude the matter, as the better opinion both in principle and on the authorities appears to be that there may be a breach of statutory duty entitling an injured party to damages although the breach in question may not amount to a criminal offence.

It by no means follows, however, that every breach of

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(1) [1941] 1 K. B. 154.

(2) [1943] A. C. 1.

C. A.

1949

HARRISON
v.
NATIONAL
COAL
BOARD.

Jenkins L.J.

the Explosives in Coal Mines Order, 1934, or of the General Regulations made under s. 86 of the Coal Mines Act, 1911, necessarily constitutes a breach of statutory duty on the part of the owner of the mine, simply because he is the owner, without regard to the terms of the provision in question, the nature of the duty which it imposes, or the person whom it charges with the performance of that duty. There are, of course, some provisions of the order and regulations which do impose statutory duties on the owner in express terms. There may well be others which should be construed as doing so, even though the owner is not expressly mentioned as the person responsible; and in general I think that a regulation to the effect that this or that shall or shall not be done in any coal mine, without any reference to the person by whom it is to be done or prevented, would prima facie cast upon the owner, acting personally or through his agents, the duty of doing or preventing the act in question. But the duties with which this case is concerned were duties in terms laid on the shot-firer, by whom alone they were capable of being performed; and there is no regulation purporting to lay them on the owner as well. The only other persons expressly charged with any duty in this particular matter are the manager and under-manager, who by reg. 1 of the General Regulations of 1913 are enjoined to "carry out and "to the best of their ability enforce" the provisions of the order.

In contrast to reg. 1, reg. 117 (which the court had to consider in *Yelland* v. *Powell Duffryn Associated Collieries Ld.* (1)) provides that "it shall be the duty of the mine-owner, agent "and manager to comply with and enforce the following "regulations," that is to say, the regulations relating to electricity. The reason why the owner should have been included in reg. 117 and omitted from reg. 1 is not apparent; but, if it had been intended to make the owner responsible in both cases, he must surely have been referred to in both regulations, or else (on the principle that he as owner was by implication fixed with an overriding and universal responsibility) omitted from both. Applying the ordinary principles of construction, the only conclusion that I can draw from the omission of the owner from reg. 1, in contrast to his inclusion in reg. 117, is that it was intended, for some reason or other,

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(1) [1941] 1 K. B. 154.

C. A.
1949
HARRISON
v.
NATIONAL
COAL
BOARD.
—
Jenkins L.J.

to lay a general duty upon him in regard to the matters covered by reg. 117, but not in regard to the matters covered by reg. 1. The owner is excluded from the technical management of the mine by s. 2, sub-s. 4, of the Act of 1911, and he therefore clearly has no power to control the proceedings of a shot-firer, even if it were otherwise practicable for him to do so. Accordingly, I do not think that he should be held to have committed a breach of statutory duty by reason only of the shot-firer's default, unless the terms of the Act and regulations either expressly or by necessary implication produce that result. So far from that being the case (ss. 75 and 90 of the Act being out of the way), the language of reg. 1, especially when contrasted with that of reg. 117, points clearly in the other direction.

As to the alternative argument advanced in this court, to the effect that there was a breach of statutory duty on the part of the manager and under-manager under reg. 1 of the General Regulations, for which the defendant board, as their employer, must be held responsible to the plaintiff, assuming it to be open to the plaintiff, I think that it must fail for the reasons which my Lord has expressed. To those reasons I would only add this: the duty imposed on the manager and under-manager is " to carry out and to the best of their " ability enforce " the order. If the words " to carry out " are construed as imposing an unqualified obligation to secure compliance with the order, then the qualification of the obligation to " enforce it " imported by the words " to the " best of their ability " seems to me to be meaningless. There can hardly be a failure " to enforce " the order unless there has been a failure on somebody's part to comply with it. Therefore, if the duty " to carry out " were broken every time there was a non-compliance by anyone, it would be no defence for the manager and under-manager to show that they had enforced the order in regard to the particular matter in question " to the best of their ability," and those words would accordingly be deprived of all effect. I agree that all three judgments in *Yelland* v. *Powell Duffryn Associated Collieries* (1) must be treated as founded upon the express imposition of a duty upon the owner by reg. 117, which explicitly formed the basis of the judgment of du Parcq L.J., and accordingly that there is nothing in that decision to conflict with the

(1) [1941] 1 K. B. 154.

view, in which I concur, that in the present case the judge came to a right conclusion, and that the appeal fails and should be dismissed.

Appeal dismissed.
Leave to appeal.

Solicitors for the plaintiff: *Corbin, Greener & Cook, for Raley & Pratt, Barnsley.*

Solicitors for the defendants: *Solicitor to the National Coal Board, for C. M. H. Glover, Doncaster.*

A. W. G.

C. A.
1949
Dec. 14, 15, 20.
Bucknill, Somervell and Denning L.JJ.

BAXTER *v.* ECKERSLEY.

Landlord and tenant—Rent restriction—Increases of rent of controlled dwelling-house without notice to quit or statutory notices of increase—Death of tenant—Widow sued for possession and for use and occupation at increased rent—Widow's claim to be "tenant" dependent on whether husband a statutory tenant at time of his death—Landlord's claim in one action to two forms of relief based on inconsistent premisses—Landlord prevented from taking advantage of own wrong—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*).

In the same proceedings a plaintiff cannot obtain two forms of relief based on inconsistent premisses.

The landlord of a dwelling-house subject to the Rent and Mortgage Interest Restrictions Act, 1939, put up the rent of the house, owing to an increase of rates, within the permitted increase, from 11*s.* 0*d.* to 11*s.* 6*d.* a week. The tenant assented to the proposal and paid the increased rent. The tenant died, and the landlord, having given due notice to quit, which had expired, brought an action against the tenant's widow claiming (1.) possession of the house, and (2.) a sum for use and occupation of the house from the date of the tenant's death at the rate of 11*s.* 6*d.* a week, alleging by his particulars that this sum was being paid by the tenant at the time of his death in rent. The widow paid the sum claimed for use and occupation of the house into court. At the hearing, the landlord gave evidence that when he raised the rent he did not tell the tenant that he would have to leave the house, and he said that he had not served on him any written notice of intention to increase the rent under the Rent Restriction Acts. The widow claimed the right to remain in possession as a "tenant" of the house under s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and it was admitted that, if the deceased tenant was at the time of his death a statutory tenant, her claim was good. The landlord claimed that his tenant was then a contractual tenant. The county court judge made an order for the recovery of possession of the house and also for payment out of court to the landlord of the money paid in for the use and occupation of the house.

Held, that the landlord, having alleged his right to, and obtained, the amount for use and occupation of the premises on the basis that his tenant's rent had been validly increased, so that he was a statutory tenant, could not, in the same proceedings, assert for the purposes of other relief (the claim for possession) that the increase of rent was invalid and the tenant not a statutory tenant: Allegans contraria non est audiendus (4 Inst. 279); for the allegation of his right to the increased rent involved the propositions: (1.) that due notices to increase the rent of his tenant had been given, and therefore (2.) that there had been due notice to terminate the tenancy (see s. 1 of the Rent Restrictions (Notice of Increase) Act, 1923), *i.e.*, that at the date of his death his tenant was a statutory tenant.

Dexters Ld. v. *Hill Crest Oil Co.* (*Bradford*) *Ld.* [1926] 1 K. B. 348, and *In re Savoy Estate Ld.: Remnant* v. *The Company* [1949] Ch. 622, applied.

Held, further, that the landlord could not take advantage of his own wrong: nullus commodum capere potest de injuria sua propria (Co. litt. 148 b); and that he could not be heard to say that a transaction (the increase of rent) was invalid when the cause of the invalidity was his own default.

The widow was therefore protected by s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

Per DENNING L.J. This was not a case of estoppel in the strict sense. *Quaere* whether the widow could hereafter be heard to say that the increases of rent were invalid.

APPEAL from Bolton county court.

The plaintiff, the owner of No. 73 Egerton Street, Farnworth, in February, 1938, let that dwelling-house to one, J. T. Eckersley, at a rent of 11*s*. 0*d*. a week, which was still the rent on September 2, 1939. On April 15, 1949, the tenant died. His widow, the defendant, remained in possession of the house. No will having been executed by the tenant and no letters of administration having been taken out, the landlord gave due notice to quit to the President of the Probate, Divorce and Admiralty Division (see s. 9 of the Administration of Estates Act, 1925), and, after the expiration of the notice to quit, claimed from the widow, in Bolton county court, possession of the house and also, by his particulars, 11*s.* 6*d.* a week from April 15, 1949, the date of the death of the tenant to July 2, 1949, for the use and occupation of the house, alleging that this sum was the amount of the weekly rent due at the date of his death. There was no evidence that the premises were controlled before September 2, 1939. The widow claimed to remain in possession as tenant by virtue of s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as applied to new-control dwelling-houses. The sum claimed for use and occupation of the house at the rate of 11*s.* 6*d.* a week was paid into court. The landlord gave evidence that there had been three increases of rent of 2*d.* each in April, 1945, April, 1946, and April, 1947; that he had told the tenant each year that the rates had risen and that he would have to pay these increases of rent; and that the tenant had replied: "all right." He said that he did not tell the tenant that he would have to leave the premises, and had not served on him any written notice or notices of intention to increase the rent under the Rent Restriction Acts: see s. 3, sub-s. 2, of the Act of 1920, and s. 1 of the Rent Restrictions (Notices of Increase) Act, 1923. It was not suggested that the increases would not have been justified if the written notices of intention to increase the rent, required by the Rent Restriction Acts, had been duly served.

The county court judge made an order for possession and also for payment out of court to the landlord of the money paid in for the use and occupation of the premises at the rate of 11*s.* 6*d.* a week.

The defendant, the widow, appealed.

John Gower for the defendant. The decision in *Kerr* v. *Bryde* (1) that notice to quit was a condition precedent to the recovery of a permitted increase of rent in the case of a controlled dwelling-house resulted in the enactment of the Rent Restrictions (Notices of Increase) Act, 1923. By s. 1 of that Act written notice of intention to increase the rent is deemed to have had effect as if it were or had been a notice to terminate the existing tenancy. Where increases of rent have been made, the court will readily presume that they have been validly made by means of the statutory notice of intention to increase the rent under that Act: see *Summers* v. *Donohue* (2) and *Brock* v. *Wollams* (3). Here the landlord's

(1) [1923] A. C. 16.
(2) [1945] K. B. 376, 380.
(3) [1949] 2 K. B. 388, 396.

evidence that he had told the tenant that the rates had gone up and that he would have to pay an increased rent can be considered as a notice to quit, for such a notice has not to be given in any particular form. But, if that is not so, the landlord cannot be heard to say that the written notices of intention to increase the rent had not been given, since, on the basis that they had been given, he has alleged in his particulars of claim that the rent paid by the tenant, Eckersley, at his death was 11*s*. 6*d*. a week: that is, 11*s*. 0*d*., the original rent, plus the three permitted increases of 2*d*. And it was on that basis that he sued at that rate for the use and occupation of the house by the defendant and obtained judgment for an amount at that rate. He cannot be allowed in the same proceedings to allege that rent at that rate was both justified and unjustified. As is stated in Halsbury's Laws of England, 2nd ed., vol. 13, under the heading of "Estoppel by Conduct," at p. 486, para. 555: "The "acceptance of money paid in consideration of the existence "of a state of things often estops the receiver, in the absence "of some cause unknown to him, entitling him to terminate "it, from denying the existence of that state of things, and "affords conclusive evidence of a waiver of any objection "to the contract or other matter in respect of which it is "paid." No doubt estoppel cannot be invoked against a statute: it is not contended that the landlord was estopped from setting up the provisions of the statute, but merely that he was estopped from denying that he had gone through the formalities prescribed by s. 3, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and s. 1 of the Rent Restrictions (Notices of Increase) Act, 1923.

[Denning L.J. Is not the landlord here taking advantage of his own wrong?]

Yes: it is a maxim of the common law, handed down by Coke, that a man cannot take advantage of his own wrong. The landlord cannot here obtain recovery of possession of this dwelling-house by alleging that he was in default by not giving the written notices of intention to increase the rent required by law. The tenant, therefore, at the time of his death must be held to have been a statutory tenant, and the defendant, his widow, is protected in her possession of the dwelling-house as a "tenant" by s. 12, sub-s. 1 (*g*), of the Act of 1920.

William Morris for the landlord. There cannot be estoppel

C. A.
1949
BAXTER
v.
ECKERSLEY.

here, since the increases of rent, made without a notice to quit or a written statutory notice of intention to increase the rent, were invalid; and no estoppel can be based on that which is invalid. The tenant could not be precluded from saying that there were no notices of intention to increase the rent given; neither could the landlord be so precluded. Estoppels should be mutual. If the appeal were allowed the effect would be revolutionary, since a landlord by an invalid increase of rent could turn a contractual into a statutory tenancy and a tenant might well wish his tenancy to remain contractual, since he could then assign it or devise it by will.

The deceased tenant here could have recovered the overpayment of rent made: see s. 14, sub-s. 1, of the Act of 1920, as modified in sch. I to the Act of 1939. The landlord, therefore, was not relying on his own wrong. [*Summers* v. *Donohue* (1); *Phillips* v. *Welton* (2); *Thynne* v. *Salmon* (3); and *Smith* v. *Mather* (4); referred to.]

Cur. adv. vult.

Dec. 20. BUCKNILL L. J. I will ask my brethren to read their judgments first.

SOMERVELL L.J. The appellant, the widow of J. T. Eckersley, claims to remain in possession of this dwelling-house as tenant protected by the Rent Restriction Acts by virtue of s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. If her husband was at the date of his death on April 15, 1949, a statutory tenant of the house, it is not disputed that she could do so. The county court judge held that the tenant was at the date of his death a contractual tenant and that, he having died intestate, no letters of administration having been taken out, and a notice to quit the premises having been served on the President of the Probate, Divorce and Admiralty Division in whom the dwelling-house was vested (see s. 9 of the Administration of Estates Act, 1925)—a notice which has expired—the defendant cannot claim the protection of s. 12, sub-s. 1 (*g*): see *Thynne* v. *Salmon* (3).

The question that arises can be formulated in this way:

(1) [1945] K. B. 376.
(2) [1948] 2 All E. R, 845.
(3) [1948] 1 K. B. 482.
(4) [1948] 2 K. B. 212.

the plaintiff, the landlord, in alleging that 11*s*. 6*d*. was the rent at the date of the death of the tenant, is necessarily alleging that as between himself and the dead man the statutory conditions entitling him to claim that sum had been fulfilled. That claim was satisfied by a payment into court. Can he, in support of his other claim for possession of the dwelling-house, tender evidence to show that the statutory conditions have not been fulfilled? In one and the same proceedings a plaintiff cannot, I think, obtain two forms of relief based on inconsistent premisses. It is, of course, clear that a tenant cannot contract out of his rights under the Rent Restriction Acts. The payment by a tenant of an increase unauthorized by the statute would not, as a matter of either contract or estoppel, preclude him from asserting his rights to recover rent so overpaid under s. 14 of the Act of 1920, as modified in the schedule to the Act of 1939, or otherwise affect his rights under the Acts. If the defendant had sought to allege that the deceased was, at the date of his death, a contractual tenant, that allegation would, so far as I can see, have succeeded. In deciding, as I do, that the plaintiff cannot, having alleged his right to and obtained the increased rent, also assert for the purpose of other relief that that increased rent was irrecoverable, I am applying a principle which was applied in *Dexters Ld.* v. *Hill Crest Oil Co.* (*Bradford*) *Ld.* (1), and in somewhat complicated circumstances in *In re Savoy Estate Ld. Remnant* v. *The Company* (2), both decisions of this court. In *Dexter's* case (1) an award was stated in the form of a special case with three alternative awards. On the matter coming before the judge, he decided that the first award was right. The buyers demanded and received payment of the amount of that award. They then appealed and sought to contend that the first award was wrong and the second right. Bankes L.J. said (2): "I am quite clear that having taken "the 2,000*l*." (the amount of the first award) "the appellants "cannot now be heard to say that the award under which "they took the money was based on a wrong view of the law." It seems to me that the principle applied in these two cases is applicable here. The increased rent having been claimed and taken, the landlord cannot obtain possession on the basis that he was not entitled to that sum.

(1) [1926] 1 K. B. 348.
(2) [1949] Ch. 622.
(3) [1926] 1 K. B. 354.

I have had the advantage of reading the judgment about to be delivered by Denning L.J., and I agree with his application to the facts of this case of the principle that a man cannot take advantage of his own wrong. In my opinion, the appeal should be allowed.

DENNING L.J. In my early days at the Bar I was engaged in a large number of Rent Restriction Act cases, and never did I hear it suggested that, on the death of a contractual tenant intestate, his widow was not protected by the Acts. The common opinion was that she was protected, just as much as the widow of a statutory tenant. Indeed, MacKinnon L.J. treated it as self-evident: see *Summers* v. *Donohue* (1). This view does, however, give rise to legal problems, and, when this court was confronted with them in December, 1947, in *Thynne* v. *Salmon* (2), the majority of the court felt obliged to hold that, on the death of a contractual tenant, no member of his family is protected by the Acts. Many landlords have taken advantage of the potentialities thus newly opened to them. Any landlord who desires to turn out a widow now anxiously asserts, if he can, that the dead husband was a contractual tenant and not a statutory tenant. Such a landlord, on the husband's death, gets to work quickly before the widow takes out letters of administration. He says that the tenancy is vested in the President of the Probate, Divorce and Admiralty Division, and serves a notice to quit on him. Thereupon he is in a position to turn the widow out: *Smith* v. *Mather* (3). This procedure has become so popular with landlords that the President has had to issue a public notice asking that these notices should be sent to the Treasury Solicitor: see [1949] W. N., at p. 130.

These landlords are, however, in some difficulty in getting the widow out if they have increased the rent during the husband's time, because the court will readily presume that the increases were validly made by means of a statutory notice and that therefore the husband was not a contractual but a statutory tenant: *Brock* v. *Wollams* (4). In this present case, the landlord has sought to overcome even that difficulty by asserting, quite unashamedly, that, although he increased the rent by the permitted amount, he did not serve statutory notices of intention to increase the rent,

(1) [1945] K. B. 376, 380.
(2) [1948] 1 K. B. 482.
(3) [1948] 2 K. B. 212.
(4) [1949] 2 K. B. 388, 396.

and that therefore the increases were invalid and the husband remained a contractual tenant. If this argument were allowed to prevail, it would put any widow at the mercy of an unscrupulous landlord who chose to assert that he never served a statutory notice of increase, for, the husband being dead, the widow would have no evidence to the contrary. In my opinion, the argument cannot prevail. The landlord has overlooked a very old principle laid down by Lord Coke long ago which says that no man can take advantage of his own wrong (1), or, to put it more precisely, that no man can be heard to say that a transaction is invalid if the cause of the invalidity is his own act or default. The other party may say it is invalid, but he may not: see *New Zealand Shipping Co. Ld.* v. *Société des Ateliers et Chantiers de France* (2).

This principle applies with especial force in this case because the provisions about a notice of intention to increase the rent were passed as a weapon of defence for tenants, and it would be strange if they could be turned into a weapon of offence by landlords. A tenant may say that an increase was invalid because there was no notice of intention to increase the rent or no proper notice, but a landlord cannot do so, because that would be to allow him to take advantage of his own default. This particular landlord has, indeed, so far had it both ways: he has not only received the increased rent for four years, but he has actually sued for and received the increased rent in this action from the widow—a thing which he could only do on the basis that the husband was a statutory tenant. Nevertheless, he has also obtained an order to evict the widow—an action which he can only take on the basis that the husband was a contractual tenant. These are inconsistent rights which he is claiming, and he cannot have both: *Dexters Ld.* v. *Hill Crest Oil Co. (Bradford) Ld.* (3), and *United Australia Ld.* v. *Barclays Bank Ld.* (4). Having obtained the increased rent, he cannot now turn round and say that the increases were invalid.

Mr. Morris, for the landlord, argued that the tenant could not be precluded from saying that the notices were invalid, so why should the landlord be precluded from saying likewise? "Estoppels," he said, "ought to be mutual." That old saying has, however, little application in our modern law of estoppel by words or conduct. It certainly has no application

(1) Co. Litt. 148, b.
(2) [1919] A. C. 1.
(3) [1926] 1 K. B. 348.
(4) [1941] A. C. 1, 30.

C. A.
1949
BAXTER v. ECKERSLEY.
Denning L.J.

to this case, which is not one of estoppel in the strict sense. I express no opinion whether or not the widow could hereafter be heard to say that the increases of rent were invalid. All I say is that the landlord should not be allowed for his own ends to say that he omitted to serve a statutory notice. He must be taken to have done so, and the widow of the late tenant is protected by the Rent Restriction Acts. The appeal should be allowed.

BUCKNILL L.J. I agree.

Appeal allowed.

Solicitors: *J. H. Milner and Son, for Leslie M. Lever & Co. Manchester; Wetherfield, Baines and Baines, for J. W. Francis Bolton.*

C. G. M.

C. A.
1950
Jan. 26, 27.
Tucker and Asquith L.JJ. and Roxburgh J

INTERNATIONAL CORPORATION LD. *v.* BESSER MANUFACTURING CO.

Procedure—Contract—Service of writ out of jurisdiction—Claim for an account—R.S.C., 1883, *Or.* 11, *r.* 1 (*e*).

Although a plaintiff is not as of right entitled to leave to serve a writ or notice of a writ out of the jurisdiction where an account is claimed, the court has power, in its discretion under Or. 11, r. 1 (*e*) of the Rules of the Supreme Court, to grant leave, and will do so in proper circumstances.

Hoerler (*trading as C. F. Mumm*) v. *Hanover Caoutchouc, Gutta Percha, and Telegraph Works* (1893) 10 T. L. R. 22, 103, applied.

APPEAL from Lynskey J.

On October 28, 1949, Master Burnand gave leave to the plaintiffs, International Corporation, Ld., to serve notice of a writ upon the defendants, Besser Manufacturing Co., of Alpena, Michigan, U.S.A., out of the jurisdiction. The defendants appealed to Lynskey J., sitting in Chambers, who ordered that the writ and leave to serve notice of it out of the jurisdiction should be set aside. The plaintiffs now appealed.

The writ in question claimed: (1.) an account of all sales by the defendants of Besser concrete products plant to purchasers in England and the continent of Europe between November, 1941, and May, 1948; (2.) an account of all sales during the like period to named firms in other named countries; (3.) payment of commission at the rate of 15 per cent. on the value of all such sales; and (4.) alternatively, 40,000 dollars as commission, or such sum as might be deemed just as a reasonable remuneration for services rendered by the plaintiffs to the defendants in and about the procuring of the sales.

In support of the claim a director of the plaintiff company had sworn an affidavit on February 9, 1949, in which he said that in or about 1941, while on a visit to the United States for the purpose of investigating methods and processes in connexion with the building industry, he visited the Besser works, and that in November of that year he agreed with the president of the Besser Co, that the plaintiff company should thereafter act as the sole agents and representatives of the defendant company in England and the countries of the continent of Europe; that the defendants would pay to the plaintiffs a commission of 15 per cent on all products of the defendants (other than motors, V-belt drives, pallets and racks) sold in England or in the countries of the continent of Europe; that the plaintiffs, in pursuance of that agreement, had thereafter done much work in making known in England and on the continent of Europe the products of the defendants, and had, despite difficulties, which for a number of years were due to the war, succeeded in promoting the sales of the defendants' products; and that the plaintiffs had from time to time made claims for commission, and had requested the defendants to render an account of commission due. In a further affidavit it was stated that it was a term of the contract that the performance of it should be in England and other countries in Europe, and that payment of any commission due should be made in England; and that in breach of the contract the commission due had not been paid and no accounts had been rendered in respect of it.

No affidavit in reply to the above had been filed by the defendants.

The case is reported solely on the question whether the court will grant leave to serve out of the jurisdiction a writ claiming an account.

Beney K.C. and *Bernard Finlay* for the plaintiffs. The judge appears to have been much influenced by the argument that in regard to the taking of an account a British court would not be a convenient forum. The plaintiffs having established a prima facie case that under the contract not only was commission payable in England but an account had to be rendered in this country, this court has power under Or. 11, r. 1 (*e*) to give leave to serve a writ out of the jurisdiction, even though an account is claimed : see *Hoerler (trading as C. F. Mumm)* v. *Hanover Caoutchouc, Gutta Percha, and Telegraph Works* (1). In a proper case the court will in the exercise of its discretion give leave.

Sandlands K.C. and *Leonard Lewis* for the defendants. An application for leave to serve a writ out of the jurisdiction being an ex parte application, there must be full and fair disclosure of material facts : see per Lord Hanworth M.R. in *Schintz* v. *Warr* (2). The affidavits filed by the plaintiffs do not disclose the true position and are lacking in sincerity. An English court will not be a convenient forum for the trial of this action.

TUCKER L.J. [having read the plaintiffs' affidavits, said that the only inference to be drawn from them was that the contract alleged was one under which commission was payable and an account had to be rendered in England. He continued :] The rule with which we are concerned in the present case, and under which this application is made, is Or. 11, r. 1 (*e*), the material parts of which are : "Service out of the jurisdiction "of a writ of summons or notice of a writ of summons may be "allowed by the court or a judge whenever the action is one "brought against a defendant not domiciled or ordinarily "resident in Scotland or Ireland, in respect of a breach committed within the jurisdiction of a contract wherever made, "even though such breach was preceded or accompanied by "a breach out of the jurisdiction which rendered impossible "the performance of the part of the contract which ought "to have been performed within the jurisdiction." In that connexion there should also be borne in mind r. 4 of Or. 11, which, after prescribing how the application is to be made says : "and no such leave shall be granted unless it shall be "made sufficiently to appear to the court or judge that the "case is a proper one for service out of the jurisdiction under "this order," underlining the fact that this is a discretionary matter for the judge in Chambers. I have carefully considered all Mr. Sandlands' criticisms with regard to these affidavits and the conduct of the plaintiffs generally, and I cannot find anything which shows that they have not made the proper kind of disclosure which has to be made on these applications. It is the duty of the plaintiffs to make out a prima facie case, and I think, on these affidavits, that they have done so.

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(1) (1893) 10 T. L. R. 22, 103. (2) [1926] Ch. 710, 717.

That brings me to the part of the case which I think is the most difficult, and that is whether the mere fact that the plaintiff company are claiming an account by itself precludes them from obtaining an order for service out of the jurisdiction because this court would not be a convenient forum for the granting of such relief. It is said that the disclosure of books and documents and so forth which may be required could more conveniently take place in America. There appears to be no authority for the proposition that this court will never grant leave to serve out of the jurisdiction where one of the remedies sought is an account, or where an account is a necessary step in ascertaining the amount due to a plaintiff. But there has been one reported case in which service out of the jurisdiction in such a case has been allowed, namely, *Hoerler (trading as C. F. Mumm)* v. *Hanover Caoutchouc, Gutta Percha, and Telegraph Works* (1). The facts in that case were as follows: the plaintiffs, who carried on business in London, brought the action for commission on a sale of goods as agents for the defendants, who were a foreign company carrying on business at Linden, near Hanover, and for an account. The contract contained the provision that in case of disputes the plaintiff firm was to submit to the laws and jurisdiction in force in Hanover. One of the questions was whether that term in the contract prevented service out of the jurisdiction, and it was held that it did not and was not to be construed as excluding the jurisdiction of the courts of this country.

In the course of his argument on behalf of the defendants, who sought to set aside the service of the writ, Mr. Danckwerts contended as follows (2): "The plaintiffs, in their affidavit, "stated that the greater part of the goods were sold by them "in England, but that they did not know the amount of the "commission due until the accounts were taken. Therefore, "this was an action for an account which would have to be "taken in Germany, and no commission would be due under "the contract until the account was taken in Germany. "Accordingly, the plaintiffs were not suing for a breach of "contract within the jurisdiction. Further, if there was

(1) 10 T. L. R. 22, 103.

(2) Ibid. 104.

C. A.

1950

INTERNATIONAL CORPORATION LD. v. BESSER MANUFACTURING CO

Tucker L.J.

"a breach within the jurisdiction, the court in its discretion "would not in this case, where the account must be taken in "Germany, and where all the books and documents were, "give leave to bring the action in this country."

That argument did not commend itself to the court, and Lord Esher M.R. does not seem to have thought it necessary in his judgment to refer to it in terms. The matter was clearly brought to the notice of the court, which, having rejected the contention that the jurisdiction was ousted, upheld the order made for service out of the jurisdiction. Of course, the way in which the discretion must be exercised in one case is very little guidance as to how it is to be exercised in another. It was a case of an account, and a case in which the amount due could not be ascertained until an account had been either taken or rendered. The court does not seem to have thought that that was an insurmountable obstacle in the way of granting leave to serve out of the jurisdiction.

I cannot say that it is any such obstacle in the present case. Nothing that I am saying, of course, should be interpreted as meaning that a plaintiff as of right can always get leave to serve out of the jurisdiction in all cases where an account is claimed. It may be that in some cases defendants by their affidavit can show that there would be some hardship or difficulty resulting from an action of this kind being tried in the courts of this country. But it may be that it would be quite a simple matter for the defendants here to write a letter, or more than one letter, giving the plaintiffs the particulars which they require as to the orders placed in these various countries, and that then it would merely be a matter of calculating the amount of commission payable. It is not yet known what issue there may be in this case—whether it will turn on a denial of the contract or on some question of quantum. Having given this matter due consideration, I think, on the whole, that leave should be granted to serve out of the jurisdiction.

ASQUITH L.J. I agree.

ROXBURGH J. I also agree.

Appeal allowed.

Solicitors for plaintiffs: *Mendes da Costa, Greenwood & Co.*
Solicitors for defendants: *Hall Clark and Goldhawk.*

A. W. G.

Affirmed
[1951] A. C. 531

Applied. HOLLOWAY v. MOBBERLEY AND PERRY LD.
[1951] 1 K. B. 316

Affirmed. H.L. [1951] 1 All E.R. 643.

HALES *v.* BOLTON LEATHERS LD.

C. A.

1949
Dec. 12, 13, 20.

Bucknill, Somervell and Denning L.JJ

Workmen's compensation—National Insurance (Industrial Injuries)—Repeal of Workmen's Compensation Acts—Transitional provisions—Industrial disease—Dermatitis produced by dust or liquids—Workman's claim to both injury benefit and compensation—Validity—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *ss.* 1, 9, 43 *and sch. III—National Insurance (Industrial Injuries) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *ss.* 1, 55 *and* 89, *sub-s.* 1, *proviso* (*a*).

Before "the appointed day" under the National Insurance (Industrial Injuries) Act, 1946—July 5, 1948—a workman was certified under s. 43 of the Workmen's Compensation Act, 1925, to be suffering from dermatitis produced by dust or liquids and to be disabled from earning full wages. The disease being due to the nature of his employment, his employers paid him compensation under the Act of 1925. Also before that day his incapacity ceased, and he returned to his former work with those employers. After "the appointed day" the workman suffered a recrudescence of the dermatitis, there being a direct connexion between that onset of dermatitis and the earlier attack before the appointed day. The workman, having drawn benefit for the incapacity under the Act of 1946, now claimed compensation for it from his employers under the Act of 1925, and the county court judge made an award in his favour, holding that the right to compensation arose once and for all as soon as the workman was certified as suffering from the disease, that was, before "the "appointed day."

Held, that, since by ss. 1 and 9 of the Workmen's Compensation Act, 1925, a right to compensation did not arise until the workman could establish incapacity from injury or disease, the right to compensation of this workman, in the case of a disease prescribed for the purposes of Part IV of the Act of 1946, "did not arise "before the appointed day" within the meaning of those words in proviso (*a*) to sub-s. 1 of s. 89 of the Act of 1946; and that, since, before it did arise, the workman had been insured under the Act of 1946, workmen's compensation was not payable to him by his employers. It was irrelevant that the workman had had an earlier attack of the disease before "the appointed "day."

Eaton v. *George Wimpey & Co. Ld.* [1938] 1 K. B. 353, considered and applied.

Per curiam. It might well be that the employers would have been liable to pay compensation if, after "the appointed day," the workman had not been employed in what might be described as disease-producing work.

APPEAL from Bolton county court.

On November 27, 1947, the respondent, a workman in the employment of the appellants, was certified under s. 43 of the

Workmen's Compensation Act, 1925, to be suffering from dermatitis produced by dust or liquids, and to be thereby disabled from earning full wages at the work at which he had been employed, as from November 26, 1947. The workman recovered compensation from the employers, who were tanners, and who last employed him during the twelve months in the employment to the nature of which the disease was due, on the basis of total incapacity until December 12, 1947, when he returned to his former work with the employers at his former wage.

July 5, 1948, was " the appointed day " under the National Insurance (Industrial Injuries) Act, 1946. On August 14, 1948, the workman was incapacitated from a recurrence of the dermatitis, and remained totally incapacitated until December 8, 1948, when he returned to employment with the employers, but at work not involving contact with liquids and at which he earned less than before his disablement. He again became totally incapacitated from the same disease from December 30, 1948, to March 10, 1949, when he resumed his former "dry" work, remaining under partial incapacity. For the periods of incapacity from August 14, 1948, the workman, being in insurable employment after " the appointed " day ", received " injury benefit " for 156 days, excluding Sundays, under the Act of 1946, and afterwards what was described as " sick pay."

The workman applied in Bolton county court for workmen's compensation from his employers in respect of the same period of incapacity. A doctor gave evidence, which was accepted, that there was a direct connexion between all the attacks of dermatitis starting with that of November, 1947: the later attacks were recurrences of the original attack.

The county court judge held that, in the case of industrial disease, the right to compensation arose once and for all as soon as the workman was certified to be suffering from a disease mentioned in sch. III to the Workmen's Compensation Act, 1925, and to be thereby disabled. Since, therefore, in his view the workman's right to compensation arose before the appointed day (see proviso (*a*) to sub-s. 1 of s. 89 of the National Insurance (Industrial Injuries) Act, 1946 (1)), he made an award in his favour.

The employers appealed.

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(1) By s. 89 of the National Insurance (Industrial Injuries) Act, 1946 (Repeals and Transitional Provisions): " (1.) Work-

C. A.
1949
HALES
v.
BOLTON
LEATHERS
LD.

Beney K.C. and *R. Lambert* for the employers. Dermatitis produced by dust or liquids is a certifiable industrial disease under s. 43 of the Workman's Compensation Act, 1925 (see No. 12 (*a*) of sch. III to the Act as extended by St. R. & O. 1929, No. 2), and is also a prescribed disease against which a person in insurable employment is insured under the National Insurance (Industrial Injuries) Act, 1946, in occupations where there is exposure to dust, liquid or vapour: see s. 55 of that Act and regs. 1, 2, 4 and 8 of the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948 (1), which came into force on June 30, 1948, before the appointed day (July 5, 1948) and No. 24 (*b*) of sch. I to those regulations.

The issue in this case depends on the construction of proviso (*a*) to sub-s. 1 of s. 89 of the Act of 1946. By that proviso the Workmen's Compensation Acts are to continue to apply to cases to which they would have applied if the Act of 1946 had not been passed, "being cases where a right "to compensation arises or has arisen in respect of employ-"ment before the appointed day except," and then follows the excepted case which the court is requested here to consider. The construction of these words may first be considered: What is meant by "a right to compensation" under the Workmen's Compensation Acts? It is clear from ss. 1 and 9

"men's compensation shall not "be payable in respect of any "employment on or after the "appointed day, and accordingly "the enactments set out in the "9th schedule to this Act are "hereby repealed as from that "day to the extent mentioned "in the 3rd column of that "schedule." (the whole of the Workmen's Compensation Act, 1925, was thus repealed) "Provided that: (*a*) the said "enactments shall continue to "apply to cases to which they "would have applied, if this "Act had not been passed, being "cases where a right to compen-"sation arises or has arisen in "respect of employment before "the appointed day, except where "in the case of a disease or "injury prescribed for the "purposes of Part IV of this "Act, the right does not arise "before the appointed day and "the workman, before it does "arise, has been insured under "this Act against that "disease or injury . . . ." "(*b*) regulations may make such "transitional or consequential "provisions as appear to the "Minister to be necessary or "expedient, having regard to the "repeal of the said enactments "in relation to diseases and to "injuries not caused by "accident, including provision "for modifying or winding up "any scheme made there-"under; . . . ."

(1) St. R. & O. 1948, No. 1371.

of the Act of 1925 that "*a* right to compensation" under the Act does not arise until incapacity, total or partial, results from the injury by accident. The liability of the employer, where personal injury by accident arising out of and in the course of the employment has been caused to a workman, is contingent on the workman's suffering incapacity from that injury. The compensation is only payable where total or partial incapacity for work results from the injury: see s. 9, sub-s. 1 of the Act of 1925. The right to compensation has not accrued until the workman suffers incapacity for work from the injury. So, a declaration of liability is merely of contingent liability in the case of incapacity for work developing: see the form of order for a declaration of liability drafted by Lord Birkenhead L.C., after consultation with Lord Atkinson, in *King* v. *Port of London Authority* (1). On the termination of the incapacity for work, the right to compensation ceases: *George Gibson & Co.* v. *Wishart* (2).

Turning again to the words in proviso (*a*), "being cases "where a right to compensation arises or has arisen in respect "of employment before the appointed day," it is plain that, though the injury from accident may have occurred in "employment before the appointed day," a right to compensation may arise—"arises" means "arises in the future"—after the appointed day. [BUCKNILL L.J. Take the case of an injury by accident happening before the appointed day and incapacity only developing after the appointed day, for example where a groom is kicked by a horse before, and injury only develops and incapacitates after, the appointed day.]

In that case the proviso secures that the groom can recover workmen's compensation from his employer: "a right to "compensation" arises in respect of "employment before "the appointed day."

But the case of a prescribed disease is treated separately and is made an exception to the rule which has just been stated. The words under construction are immediately followed by an exception: "except where, in the case of a "disease or injury prescribed for the purposes of Part IV "of this Act, *the* right does not arise before the appointed day "and the workman, before it does arise, has been insured "under this Act against that disease or injury." This last condition is admitted to have been satisfied in this case, and the fact is accepted that this is the case of a disease prescribed for the purpose of Part IV of the Act of 1946. What is in contest is whether the workman's right to compensation did or did not arise before "the appointed day." The county court judge held that his right to compensation arose once and for all as soon as the workman was certified to be suffering from dermatitis produced by dust or liquids, that is, before "the appointed day," on November 27, 1947, as from November 26, 1947. It is submitted that this is wrong and that the right to compensation for the dermatitis arose only on the workman's incapacity after "the appointed day," that was, on August 14, 1948, and thereafter for the periods of incapacity for which he claimed: see regs. 5, 6, 7 and 8 of the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations (1), which are only consistent with this construction of the Act.

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(1) [1920] A. C. 1, 12, 13. (2) [1915] A. C. 18.

By s. 43 of the Act of 1925 the last employer is rendered liable to pay compensation who has employed the workman in the scheduled disease-producing employment, subject to contribution by other employers who, within twelve months back from the date of his disability, have employed the workman in such employment. Section 43 appears to draw no distinction between an original attack of a scheduled industrial disease and a recrudescence of it, provided that, at the time of the recrudescence or within the previous twelve months, the workman has been employed in the disease-producing employment and the recrudescence is due to that employment. The provision, therefore, in proviso (*a*) that, where the right to compensation does not arise before "the "appointed day," that is, where the incapacity caused by the recrudescence of the disease does not arise before "the "appointed day" and the workman, before it does arise, has been insured under the Act of 1946, the Workmen's Compensation Acts do not apply is exactly the provision which would be expected. The workman must, therefore, rest content with the benefit which he has drawn under the Act of 1946: he is not entitled to workmen's compensation from these employers, and the decision of the county court judge should be reversed. [*Wheatley* v. *Lambton, Hetton and Joicey Collieries Ld.* (2) and the judgments of Warrington L.J., and Atkin L.J., in *Briggs* v. *Thomas Dryden & Sons* (3) referred to.]

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(1) St. R. & O. 1948, No. 1371.

(2) [1937] 2 K. B. 426.

(3) [1925] 2 K. B. 667, 675, 678.

Melford Stevenson K.C. and *C. M. W. Elliott* for the workman. The decision of the county court judge was right. The only question here is whether the workman is entitled to workmen's compensation from the employers. Whether he was or was not entitled to benefit under the National Insurance (Industrial Injuries) Act, 1946, is not in issue. The solution of the problem, no doubt, depends on the construction of proviso (*a*) to sub-s. 1 of s. 89 of the Act of 1946. Apart from sub-s. 1 of s. 89, there is no question that the workman was entitled to compensation from his employers. A workman who has been certified as suffering from dermatitis produced by dust or liquids and as being thereby disabled from earning full wages at the work at which he was employed and who returns to his employment at his former wages (that is what occurred here in 1947) although he has not in fact recovered from the disease, and again becomes disabled thereby (that was abundantly proved here by the medical evidence) can rely upon the original certificate, and need not obtain a fresh one in order to obtain compensation : *Richards* v. *Goskar* (1). Lord Atkin in that case said (2) : " The simple question " is whether a workman who has been certified to have been " disabled by an industrial disease and is found to be still " suffering from that disease and to be disabled by that " disease, is debarred from recovering compensation, because " for some time after the original disablement he was able " to earn full wages at the employment in respect of which " he was originally certified. Such a proposition, as it appears " to me, is quite inconsistent with the rights given in the case " of ordinary accidents ; it is inconsistent with the terms of " the Act, including ss. 12 and 18 which apply to both ordinary " accidents and to cases of industrial disease."

Apart from the proviso, therefore, this workman would be entitled to workmen's compensation from his employers in respect of disease—a notional accident—which developed in 1947 before " the appointed day," the date of the disablement being certified as being November 26, 1947, and the certificate being dated November 27, 1947. That was the date of the original development of the disease. Section 55 of the Act of 1946 grants insurance against a prescribed disease, being a disease due to the nature of the employment and " developed " on or after the appointed day." That must mean originally developed—developed for the first time.

(1) [1937] A. C. 304. (2) Ibid. 324.

The material words of proviso (*a*) to sub-s. 1 of s. 89, are: "the right" to compensation, "does not arise before the "appointed day." But the right to compensation here did "arise before the appointed day," when a certificate was given on November 27, 1947, that the workman was suffering from dermatitis produced by dust or liquids and to be thereby disabled from earning full wages at the work at which he had been employed. That was the time when the right to compensation arose. At any time thereafter the workman was entitled to a declaration of liability. There has been nothing to take away the right to compensation then acquired. When back at work at his full wages the workman still had a contingent right to compensation dating from November, 1947—contingent on his becoming disabled by the disease. It cannot have been the intention of the scheme to impose on the State liabilities which were being borne by employers who presumably had made provision against those liabilities by insurance. The workman is stated to have such a contingent right to compensation by Lord Atkin in *Richards* v. *Goskar* (1). [SOMERVELL L.J. referred to *Eaton* v. *George Wimpey & Co. Ld.* (2).] But in *Richards* v. *Goskar* (1) it had been decided that a workman could rely on the original certificate and need not obtain a fresh certificate to obtain compensation.

The exception, therefore, in proviso (*a*) is not here applicable: it may well refer to the case where a workman has been suffering from the disease before "the appointed day" but no certificate has been obtained under s. 43 of the Act of 1925 before that day. Accordingly, the earlier words of the proviso are here applicable. The Workmen's Compensation Acts "shall continue to apply to cases to which they would "have applied if this Act had not been passed" (this, it is clear, is such a case) "where a right to compensation . . . . "has arisen in respect of employment before the appointed "day." That also is the case here, and the workman is entitled to compensation from these employers.

R. Lambert in reply. In *Holmes* v. *Kaye, Son & Co. Ld.* (3) it was held that in a case of dermatitis a workman is not entitled to a declaration of liability as a matter of law or right. The question is one for the discretion of the county court judge upon the evidence. The county court judge in that case

(1) [1937] A. C. 304, 324.
(2) [1938] 1 K. B. 353.
(3) (1934) 27 B. W. C. C. 116.

had found that the workman had been disabled for all forms of work from September, 1933, to the end of December, 1933, but that after that time he was fit to do any kind of work except dusty work; and that he could easily earn at any other work not less than his pre-accident weekly wages which were 25*s.* 0*d.* a week; and he refused to make a declaration of liability. Non constat, therefore, that a declaration of liability would have been granted here. This case comes within the exception in proviso (*a*) in the case of a prescribed disease where the right to compensation did not arise before "the appointed day."

Cur. adv. vult.

Dec. 20. Somervell L.J. [reading the judgment of the court]. This case concerns the transition from the statutory scheme for dealing with industrial accidents or disease embodied in the Workmen's Compensation Acts to the scheme which has taken its place to be found in the National Insurance (Industrial Injuries) Act, 1946. The latter Act came into force on the appointed day which was July 5, 1948.

In the present proceedings the workman claims compensation under the Workmen's Compensation Acts in respect of total incapacity from dermatitis from August 14, 1948, to December 8, 1948, partial from that date to December 30, 1948, from that date total to March 10, 1949, and partial thereafter. [His Lordship referred to the facts, and continued:] It is agreed that if the Act of 1946 is applicable the dermatitis from which the workman suffered is a disease covered by that Act and the regulations made under it. That Act applies, subject to any special provisions, to persons employed in insurable employment after the appointed day. The workman was so employed. The workman applied for and obtained the benefits as provided for by that Act in respect of the periods covered by the present claim on the basis that that Act was applicable in respect of his incapacity during these periods. The question is whether by the Act of 1946 the provisions of the Workmen's Compensation Acts are continued so as to give a right to compensation to the workman under those Acts from his employers in respect of the periods for which the claim is brought.

The construction of the provisions of the Act of 1946 on which this appeal has to be decided depends on the legal position under the Workmen's Compensation Act, 1925, generally and, in particular, with regard to industrial diseases. The general position is familiar, but it is necessary to summarize it. Section 1 provides that: "If in any employment personal "injury by accident arising out of and in the course of the "employment is caused to a workman, his employer shall, "subject as hereinafter mentioned, be liable to pay compen-"sation . . . ." The employer is obviously the employer at the time of the accident. There is a proviso that the employer shall not be liable in respect of an injury which does not disable the workman for a period of at least three days. We are not concerned with cases where the accident results in death. Section 9 lays down in other cases that the compensation is payable where total or partial incapacity for work results from the injury. The compensation is to be a weekly payment during the incapacity calculated in accordance with certain rules. We have to construe later the words in proviso (*a*) to sub-s. 1 of s. 89 of the National Insurance (Industrial Injuries) Act, 1946, "a right to compensation "arises or has arisen in respect of employment." It seems to us fairly plain that a right to compensation arises if and when the workman can establish total or partial incapacity resulting from the injury by accident. There may be an interval between the accident and the incapacity. There may be a temporary recovery and then further incapacity resulting from the injury. All these will arise "in respect "of the employment" at the time of the injury or accident.

Section 43 of the Act of 1925 applies the Act to certain industrial diseases, including that in question here—dermatitis produced by dust or liquids—when the disease is due to the nature of the workman's employment. Industrial diseases result normally, perhaps always, from exposure over a period of time to certain conditions. They do not, like accidents, result from a definite event at a definite time. A workman has been working at what we will call for brevity a disease-producing employment with A. for six months, with B. for six months, with C. for six months, and then with D. After three months with D. the disease develops so as to disable the workman. In such a case, s. 43 provides, the disease when certified is to be regarded as a personal injury by accident. The last employer in the disease-producing employment, in the case put D., is liable; but, if the disease is of such a nature as to be contracted by a gradual process, other employers who have employed the workman in the disease-producing employment within the previous twelve months can be called on to contribute. In the case put, C. and B. could be called on, but not A.

The evidence in this case and in other reported cases shows that, where a workman has once had an industrial disease, it is liable to recur if he continues in the disease-producing employment. This was recognized by s. 43, sub-s. 1 (*b*), which deprives a workman of his compensation if he wilfully and falsely represents in writing at the time of entering a new disease-producing employment that he has not previously suffered from the disease. Apart from this provision, s. 43, as we read it, draws no distinction between an original attack and a recurrence provided that at the time of the recurrence or within the previous twelve months the workman has been employed in the disease-producing employment and the recurrence is due to that employment. In such a case the last employer is liable on the basis stated above. It is irrelevant that the man is more susceptible because he has had an attack of the disease before. This is clearly brought out, we think, in *Eaton* v. *George Wimpey & Co. Ld.* (1). In that case the workman suffered from dermatitis and received compensation from the employer from 1933 till June, 1935, when he compounded all claims against his then employer for a lump sum. He left that employer, and in May, 1936, became employed by the respondents in the case, and in that employment had to handle dry cement, which led to a recurrence in July, 1936, of dermatitis. The county court judge found that, by reason of the attacks of dermatitis in 1933 to 1935, the workman had become susceptible to the disease and had not completely recovered from those attacks. The employers contended that the attack of the disease in 1936 was merely a recurrence of the original " accident " in 1933. This court held that the employers were within the meaning of s. 43, sub-s. 1 (*c*), the employers who last employed the workman during the twelve months before July, 1936, in the employment to the nature of which the disease was due, and were liable.

This case shows that a recurrence of an industrial disease, due in part to the original attack and in part to the continued employment in the relevant process, gives a right to compensation against the second employer, the susceptibility arising from the original attack being irrelevant, although,

(1) [1938] 1 K. B. 353.

if the employer at that time had employed the man within the twelve months, whether the man had had an attack or not, he could have been called on to contribute. This, as will appear, is important in considering the county court judge's reasons for his decision in this case.

We will now turn to the Act of 1946. Section 1 concerns accidents in the ordinary sense, and insures all persons employed in insurable employment "in manner provided "by this Act against personal injury caused on or after the "appointed day by accident arising out of and in the course "of such employment." This seems clear: one would expect to find that, if the accident occurred before the appointed day, the workman having no rights under this Act would have his rights under the Workmen's Compensation Acts preserved in respect of incapacities continuing or arising after the appointed day, and that those suffering accidents after the appointed day would be entitled to benefits under the new scheme but not under the old. Part IV, containing ss. 55, 56 and 57, extends the insurance inter alia to prescribed diseases, of which dermatitis is one, being a disease due to the nature of the insurable employment and "developed "on or after the appointed day": s. 55, sub-s. 1.

Bearing in mind the way in which s. 43 provided for industrial diseases and the decision in *Eaton's* case (1), we would have said that the present workman's dermatitis in August, 1948, developed after the appointed day. The repeals and transitional provisions are contained in s. 89, and it is on the construction of that section that this appeal depends. [His Lordship read s. 89, sub-s. 1, and proviso (*a*), and continued:] The opening words refer back to the opening words of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1925, which I have cited. If in any employment "on or "after the appointed day" there is personal injury by accident, no claim under the Workmen's Compensation Act arises, and the case falls under the Act of 1946. The enactments set out in sch. IX include the whole of the Workmen's Compensation Act, 1925. The legislation obviously could not stop there. It must make provision for the effects continuing after the appointed day resulting from injury by accidents in any employment before the appointed day. If incapacity existed on the appointed day the employer must have a right to maintain that it had later ceased, and the workman to maintain in respect of accidents before the

(1) [1938] 1 K. B. 353.

C. A.

1949

HALES
v.
BOLTON
LEATHERS
LD.

appointed day that incapacity had arisen or increased after that day. At least so one would expect. The enactments, including the Act of 1925, are, under the opening words of the proviso, to continue to apply to cases "where a right to "compensation arises or has arisen in respect of employment "before the appointed day."

We will take a case put by Bucknill L.J., in the course of the argument—that of a groom kicked by a horse before the appointed day. The groom is not "disabled" at the time, and is able to carry on with his work. After the appointed day injury develops and he has to go to hospital. His right to compensation, as it seems to us, "arises" at the time of his disability or incapacity. The Act of 1925 gives compensation, not for pain and suffering, but for total or partial incapacity. But, in the case put, this right, though arising after the appointed day, is in respect of employment before the appointed day, and proviso (*a*) to sub-s. 1 of s. 89 preserves his rights under the Workmen's Compensation Acts. The case where incapacity is continuing at the appointed day is plainly covered. There is also, as it seems to us, no difficulty about the case where there has been a temporary recovery at the appointed day, but later incapacity, the result of the pre-appointed-day injury, redevelops. This redevelopment gives a right to compensation which "arises" after the appointed day, but it is in respect of employment before the appointed day. If this is right, then the words "the right to compensation" are given what seem to us their natural construction, and, so far as ordinary accidents are concerned, the provisions clearly mean what one would expect them to mean. The following words show that this provision is not to apply, completely, at any rate, to the case of industrial diseases. The words themselves seem to us to confirm the construction which we have placed on the earlier words. If it is necessary in the case of a disease to exclude from the continuance of the Workmen's Compensation Acts cases where the right does not arise before the appointed day, this implies that in the case of ordinary accidents the Acts may continue and apply where the right does not arise before, that is, arises after, the appointed day, but in respect of employment before it, as in the first and third cases we have considered above. In the present case in our opinion the right to compensation in respect of the incapacity as from August, 1948, arose after the appointed day. The Workmen's

Compensation Acts do not, therefore, apply if the workman has been insured under the Act of 1946 against that disease. It is agreed that this condition is fulfilled.

The county court judge held that in the case of an industrial disease the right to compensation arises once for all as soon as the workman is certified to be suffering from a disease mentioned in sch. III and to be thereby disabled. In the present case, he held, this was on November 27, 1947. This may well be right if, thereafter, the workman is never employed in what we have called the disease-producing work. What we have said above with regard to s. 43 and to *Eaton's* case (1) seems to us to show that this is not the position if there is subsequent employment in the work which leads to the disease and there is a recurrence.

The county court judge was referred, as we were, to various paragraphs in the regulations made under the Act of 1946. He took the view that these regulations could not affect the construction of the Act. The regulation-making power is conferred by s. 89, sub-s. 1, proviso (*b*), and is as follows: "regulations may make such transitional or consequential "provisions as appear to the Minister to be necessary or "expedient, having regard to the repeal of the said enactments "in relation to diseases and to injuries not caused by accident, "including provision for modifying or winding up any scheme "made thereunder." We agree that these regulations could not contradict the Act. They might, we think, properly be referred to as working out in detail the provisions of the Act consistently with its terms. So far as they are relevant to the present issue they seem to us to set out with greater particularity the effect which, so far as the present case is concerned, follows from the words of s. 89, sub-s. 1. The only provision of the old scheme which is disregarded in the transitional provisions is the spread of liability over the twelve months. We can illustrate what we mean by the case of a man who developed an industrial disease for the first time three months after the appointed day, having been employed in the disease-producing work for the previous twelve months up to the appointed day by A. and thereafter by B. He would clearly be entitled to the benefits under the Act of 1946, and would have no claim under the Workmen's Compensation Acts. A., who could have been called on to contribute under s. 43, is free of all liability. The general

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(1) [1938] 1 K. B. 353.

C. A.
1949
Hales v. Bolton Leathers Ld.

basis of the two schemes is so different that one can well understand not further complicating the change-over. We think that the appeal should be allowed.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co., for John Taylor & Co., Manchester; Corbin, Greener & Cook, for Morrish & Co., Leeds.*

C. G. M.

C. A.
1950
Jan. 24.

Evershed M.R., Somervell L.J. and Hodson J.

MORLEYS (BIRMINGHAM) LD. *v.* SLATER.

Landlord and tenant—Rent restriction—House damaged by enemy action and rendered uninhabitable—Continued occupation by tenant for business purposes—Contractual tenancy determined—Claim to statutory tenancy.

A house was damaged by enemy action in 1940 and the tenant ceased to live there. In 1949, when he was still occupying the house in connexion with his business, the landlord gave him notice to quit. He claimed the protection of the Rent Restriction Acts.

Held, that, as the house remained substantially the original building in the occupation of the tenant, he remained entitled to the protection of the Rent Restriction Acts notwithstanding that it had been rendered uninhabitable by the damage.

Ellis & Sons, Amalgamated Properties Ld. v. *Sisman* [1948] 1 K. B. 653, explained and distinguished.

Appeal from Birmingham county court.

The plaintiffs, Morleys (Birmingham) Ld., were the owners of a house, No. 203 Darwin Street, Birmingham, which was let to the defendant, Lewis Slater, and used by him as a residence and for his business of a rag-and-bone merchant. In November, 1940, the house was bombed, and he, with his wife and family, moved out of it. It was agreed, however, that he should pay a reduced rent of 3*l.* 9*s.* 4*d.* monthly for the house.

The landlords wished to use the house for the purposes of their business, and they purported to determine the tenancy by a notice to quit in writing, dated May 19, 1949 and expiring on July 1, 1949. The tenant disputed their right to possession, and they accordingly brought an action in Birmingham county court. The tenant, by his defence, disputed the landlords' claim, "because the premises were, until damaged "by enemy action in 1940, partly dwelling-house and partly "business premises and the tenancies thereof were controlled "by the Rent Restriction Acts"; and he claimed the protection of the Acts.

The county court judge found that the house was let to the tenant as a dwelling-house; that he lived there with his family until November, 1940, when the building was damaged by bombs; that he then moved out of the house; and that he was waiting to return to live there until such time as the house should be repaired, and to occupy it with his family. The county court judge gave judgment for the tenant. The landlords appealed.

Ashe Lincoln K.C. and *G. Grove* for the landlords. This case is unique, as the house has been bombed but not repaired or rebuilt. Any question of animus revertendi on the part of the tenant has nothing to do with the case. The moment at which the notice to quit expires is the moment of time which governs the case: see *Prout* v. *Hunter* (1). The question is whether there is at that date a dwelling-house in existence within the meaning of the Rent Restriction Acts, that is, a house which is let as a separate dwelling. If that is not the case, no statutory tenancy can exist. This attempt to make business premises out of a derelict house takes the premises out of the protection of the Rent Restriction Acts. [*Ellis & Sons Amalgamated Properties, Ld.* v. *Sisman* (2); and *Curl* v. *Angelo* (3) referred to.] A statutory tenancy can only be determined under the statutes or by a voluntary walking out: see *Simper* v. *Coombs* (4). The moment of time which has to be looked at being that at which the contractual tenancy comes to an end, the question is whether a statutory tenancy has then come into existence. It can only do so if there is something which can be regarded as a habitable dwelling-house. [Counsel referred to *Williams* v. *Perry* (5).]

Geoffrey Green for the tenant. On the evidence the county

(1) [1924] 2 K. B. 736.
(2) [1948] 1 K. B. 653.
(3) [1948] L. J. R. 1756.
(4) [1948] W. N. 74; [1948] L. J. R. 1080.
(5) [1924] 1 K. B. 936.

court judge was entitled to find that this was a dwelling-house. There has never been any mention of total destruction ; the house has only been damaged, and the original roof is still on the building. The tenant must satisfy the court that he regards the premises as his home. If he showed no intention (assuming that he was a statutory tenant) to return and live there, he could no longer be regarded as a statutory tenant. He is not living there, but his position is that of a person who intends to return, always assuming that it will be possible to live on the premises.

There is evidence that the building, which was let to him as a dwelling-house, is still substantially a dwelling-house. The question of habitability can never be conclusive as to whether a building is a dwelling-house or not. What the position may be afterwards makes no difference so long as he was a statutory tenant at the material time, that is, the date of the notice to quit.

Lincoln K.C. replying, referred to *Brown* v. *Brash* (1).

EVERSHED M.R. This case has raised a point of some novelty and, I think, of no little difficulty. I have felt more doubt about it than my brethren.

By their particulars of claim the plaintiff landlords alleged that they were entitled to possession of No. 203 Darwin Street, which was let to the defendant on a monthly tenancy at the monthly rent of 3*l.* 9*s.* 4*d.*, "which said tenancy was "duly determined by notice in writing to quit" expiring on July 1, 1949. The tenant in his defence disputed the landlords' claim because the premises were, until damaged by enemy action in 1941, partly dwelling-house and partly business premises, so that the tenancies of them were controlled under the Rent Restriction Acts. No one reading the particulars of claim would guess that the argument which underlay the landlords' claim was that, as the result of bomb damage, the premises in question had ceased to be for the purposes of the Acts let as a dwelling-house on July 1, 1949.

The premises were damaged by enemy action in November, 1940. Although there is no finding in terms to this effect, the parties are agreed that, as the result of that damage, now nearly nine years old, the premises became, and are still, uninhabitable, which should be understood here as meaning that they are not capable of being occupied and used in the

(1) [1948] 2 K. B. 247.

ordinary sense of the term for living quarters. As a result, says Mr. Ashe Lincoln, (and he founds himself in large measure on the decision of this court in *Ellis & Sons Amalgamated Properties, Ld.* v. *Sisman* (1)), the necessary condition for invoking the Act by a tenant is absent because the premises have ceased to be let as a dwelling-house. It is on that ground that the argument for the landlords has been based. The tenant is still in actual occupation of the premises. The evidence is that he uses them now for the purposes of a rag-and-bone merchant, whereas formerly he used them in part as his home and residence and partly for the purpose of his business. He now uses them exclusively for the latter purpose, occupying a room in the premises for office work and using the yard and other land for his business. There was a subsidiary argument that the nature of the use had so much changed that at the relevant date, namely, at the date of the expiry of the notice to quit, the premises were let, not as a dwelling-house, but as business premises and as such were excluded from the Act.

The general question, which is of some interest and novelty, may be stated thus : where premises have been damaged by bombs and rendered uninhabitable in the sense in which I have defined the word, is the result that the tenant, who has had to go out and live somewhere else, is, on the termination of his contractual tenancy, deprived of his right to claim the benefit of the Acts by reason only of those facts ?

The evidence consisted first of that of the managing director of the plaintiff company, who stated, so far as is relevant, simply that the landlords wanted possession for their business ; that the yard and building were not habitable ; and that the tenant used them as a store. The tenant stated that he lived at the premises until November, 1940, when they were bombed. He moved out, having arranged to pay a reduced rent. He said that he still wishes to go back and live at the house. He made no claim on the War Damage Commission. The house still had its roof, and he had obtained from a builder an estimate for the repair of one room to live in.

The county court judge " found that No. 203 Darwin Street " was let to the tenant as a dwelling-house ; that he lived " there with his family until November, 1940, when the " building was damaged by bombs ; that the tenant then " moved out of the house ; that he was waiting to return

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(1) [1948] 1 K. B. 653.

"at such time as the premises should be repaired and to "occupy them with his family. I therefore held that his "tenancy of No. 203 was protected by the Rent Restriction "Acts."

In my judgment, the proper test in cases of this kind is whether the house, as such, can be said substantially to have ceased to exist. There was here a contract whereby the premises were let to the tenant. Undoubtedly, on the evidence, when the letting was effected, they were let to him as a dwelling-house within the meaning of the Act. It was argued for the landlord that after the bomb damage, when the notice to quit expired, it followed because the premises were uninhabitable and uninhabited in fact for living purposes, that they were not then let as a dwelling-house to the tenant.

Counsel founded himself for that proposition to some extent on *Ellis & Sons Amalgamated Properties Ld.* v. *Sisman* (1). But if that proposition be correct, what is the answer to the question posed by Somervell L.J., during the argument: for what purpose were they let at that date? One can imagine, if habitability be the test, a case in which a house is rendered temporarily uninhabitable by the flooding of the ground floor by inundation from a river: until the water has been pumped out and the house dried, it is in fact uninhabitable. Could it be said, if the landlord in such circumstances gave notice to terminate the tenancy, that the tenant was deprived of his right to claim protection because at the date of the termination of the notice the premises were not in fact "let "to him as a dwelling-house"? It would be very surprising if an affirmative answer had to be given to that question; and it would, I think, be very surprising if a tenant, who had to be evacuated because his house was damaged by enemy action and to whom notice to quit was given before repairs were done, were deprived of his right to claim protection under the Acts. For my part, I think that the test should be (and this I believe to be borne out by the authorities) whether at the relevant date it can be said that the dwelling-house which is the subject-matter of the original contract has, as such, ceased to exist either because it has been wholly demolished or has disappeared or because it has been converted into something else, for example, into business premises. In this case, I think that the judge's judgment must be taken to have amounted to a finding that it had not ceased to exist, and

(1) [1948] 1 K. B. 653.

I think that there is ample evidence to support that view. I have referred to the evidence: the roof was still on and the tenant was using the house for some purpose.

Without going through the cases, I think that their effect is correctly summarized in Megarry on The Rent Acts, 4th ed., at p. 83. He there says, "the restrictions of the Acts do not "inhere in the land after the demolition of the dwelling-house "but remain only so long as it is there." He also says in his note referring to the *Ellis* case (1): "It seems pretty clear "that the statutory tenancy perishes with the dwelling-house." That is a matter which we are not called upon to decide, but the argument founded on the cases appears to me to be that the test is whether the house which was the subject of the original tenancy has, as such, ceased to exist.

At this stage I will refer more fully to *Ellis & Sons Amalgamated Properties Ld.* v. *Sisman* (1), because at first reading it would appear that certain observations of Tucker L.J., on which Mr. Ashe Lincoln very naturally and properly relied, lend support to the view for which he was contending, namely, that the question of habitability or habitation was in fact the test. The facts were these: the house in question was damaged, though by no means destroyed, by enemy action in 1941. The landlord at a later stage, in collaboration with the war-damage authorities, pulled down completely the remains of the original structure, cleared the site and erected on it a new house of new material though in all respects similar to the original house. Throughout all this period the contractual tenancy continued to subsist, but before the new house was completed and ready for habitation—before the windows were put into the walls—the landlord by proper notice to quit terminated the contractual tenancy. He brought an action for possession, and the tenant claimed the protection of the Rent Restriction Acts in respect of the new edifice.

As I think is made quite plain by the earlier part of Tucker L.J.'s judgment (2), it is vital to his conclusion that the old dwelling-house had passed completely away, not through the explosion of the bomb, but as a result of the subsequent demolition, and had been replaced by an entirely new house; and, further, that the tenant had never during his contractual tenancy occupied as his dwelling that new house; so that he could not say that that new house had ever been let to him as a separate dwelling. It was not in fact used by him or let

(1) [1948] 1 K. B. 653.

(2) Ibid. 667.

C. A.

1950

MORLEY'S (BIRMINGHAM) LD. *v.* SLATER.

Evershed M.R.

to him as such at the material date. In the light of those facts must be read this passage from Tucker, L.J.'s judgment (1): "True, in several cases it has been pointed out that a tenant "does not lose the benefit of these Acts merely because in the "course of his business or occupation he may be absent "from the premises for long periods—for example, a merchant "seaman—but the house must be one which is in fact being "used by the tenant as a dwelling-house. Here it seems to me "impossible to say, on the uncontradicted evidence and on the "judge's finding, that on June 21, 1947"—that was the date of the expiration of the notice to quit—"this was a house "which was let as a separate dwelling. It was not completed "or fit for habitation, the windows were not in, and it was, in "my view, not only not being used as a dwelling-house, but "it was not fit for or capable of use as a dwelling-house at the "material date."

At first sight, as already stated, those words may appear to support the proposition that habitability at the relevant date was the test. But I think that, when they are examined in relation to the earlier reasoning and the facts, it is clear that that is not so, and that the basis of the decision was the total disappearance of the original subject-matter of the contract plus the fact that the new house had never at any material date reached the condition when the tenant could declare that it was occupied as his home by him. The sentence which most points in the direction of Mr. Ashe Lincoln's argument is, of course, "but the house must be one which is in fact "being used by the tenant as a dwelling-house." Again, however, having regard to the preceding reference to merchant seamen, I do not think that the Lord Justice meant that at the date when the Act applied it must be shown that there was user or even the possibility of user of the house as a dwelling-house by the tenant. If his words had that meaning, it was obviously, I think, unnecessary for the purposes of the decision and I venture, with all respect, to think that it was stating the matter somewhat too broadly.

For reasons which I have already given, I think that it would be wrong to hold that where, whether by enemy action, flood or fire, it had been made impossible for a house to be inhabited in the ordinary sense of the word and it was not so occupied at the moment when the contractual tenancy ended, that would be conclusive against the tenant's invocation of the

(1) [1948] 1 K. B. 653, 668.

Rent Restriction Acts. Cohen L.J., in the *Ellis* case said (1): "But I entirely agree with my Lord that here the evidence "clearly establishes that, at the material date, when the notice "to determine the tenancy expired, there was no house fit for "occupation on the premises. That being so, I do not think "that it was possible for the tenant to establish a claim to "remain on as statutory tenant." The Lord Justice also said however (1): "The only possible inference from the evidence "is that the house comprised in the original tenancy ceased "to exist as a house." I therefore think that the case cited is not an authority for Mr. Ashe Lincoln's argument.

There remains the question which he put somewhat tentatively—whether it can be said on the facts as found that there was here a change from the original user as a dwelling-house to user for business purposes? I think that it would be dangerous to suggest that some temporary arrangement for the use of what remained for purposes such as storing belongings would have so far-reaching an effect. On the other hand, of course, equally it may be possible that a new bargain is made which does not contemplate the restoration of the dwelling-house or its use as a dwelling-house. Those, however, are matters of fact, and the only evidence on the matter is the one sentence "defendant uses as store." The judge has not found the facts in the landlords' favour. I therefore think that there is no sufficient basis for that request.

The case is not to my mind wholly satisfactory: a long period has elapsed since the bomb struck these premises, and there is no evidence as to what is likely or indeed possible to be done about them. The landlords may or may not be under an obligation to restore them. The tenant may or may not be entitled to do so, if he so desires or is able to do so. There may or may not be some restrictions applicable. On none of those questions is there any material before us. In deciding, as I suggest that we should, that the county court judge's judgment be left undisturbed, I am not prejudging any subsequent application which the landlords may be entitled to make according as events turn out in the future and according as these premises become or do not become available for occupation for any particular purpose. Suffice it for the moment to say that I think that the judge was entitled to find on the evidence that this house remained substantially the same identifiable edifice. It was originally let as a dwelling-

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(1) [1948] 1 K.B. 653, 669.

C. A.

1950

MORLEY'S (BIRMINGHAM) LD. *v.* SLATER.

Evershed M.R.

house, and I am not prepared to hold that at the material date it ceased to be so let within the meaning of the Acts. That being so, and the tenant being in fact in possession of it, I see no ground for disturbing the judge's conclusion that he is entitled to claim the aid of the Rent Restriction Acts. I would dismiss the appeal.

SOMERVELL L.J.: I agree.

HODSON J.: I agree.

Appeal dismissed.

Solicitors: *Beckingsales and Naylors, for Joseph Cohen & Cowen, Birmingham; Swepstones, for Parkhouse & Allée, Birmingham.*

J. L. D.

C. A.

1950

Jan. 13.

Somervell and Jenkins L.JJ. and Romer J.

WILLIAMS *v.* CARDIFF CORPORATION.

Negligence—Licensor and licensee—Child playing on local authority's waste land—Fall down bank on to broken glass—Injury—Allurement—Concealed danger—Trap—Liability of licensor.

An infant, aged 4½ years, while playing on a piece of waste land, the property of a local authority, was injured through rolling down a bank on to some broken glass.

Held, that, in view of the evidence, the presence of the bank, coupled with the presence of tins and broken glass on land on which children were allowed to play, constituted a trap within the principles laid down with regard to the liability of occupiers of land on which children are allowed by them to play.

Liddle v. *Yorkshire* (*North Riding*) *County Council* [1934] 2 K. B. 101, considered.

APPEAL from Cardiff and Barry county court.

An infant, aged 4½ years, while playing on a piece of waste land, the property of the Cardiff Corporation, rolled down a bank on to broken glass and tins, as a result of which he received an injury to his nose. In an action brought by his father, as next friend, he claimed damages for the injury against the corporation. Damages having been awarded by the county court judge, the corporation appealed on the grounds that he was wrong in law in holding that the corporation knew that children played on the ground, that broken glass and tins on the ground constituted an allurement and not an obvious danger, and that the accident was caused by the broken glass and tins.

Donald Walters for the corporation. The bank itself was an obvious danger : see *Latham* v. *R. Johnson & Nephew Ld.* (1). The accident was merely due to the child's falling down the bank. It is not known why he did so. The bank was not a "trap" or an "allurement." The liability of the corporation depends on whether or not the bank was a danger. The cause of the accident was the act of falling down the bank, and not the broken glass. [He referred to *Liddle* v. *Yorkshire (North Riding) County Council* (2) and *Morley* v. *Staffordshire County Council* (3).

David Pennant, for the plaintiff, was not called on to argue.

SOMERVELL L.J. [after stating the facts :] The corporation called no evidence and counsel conceded that the child was a licensee, which I think would be the inevitable inference from the evidence which has been given as to the frequency with which children played on this site, and that it was used as a tip for sweepings. With regard to the injury, again it is not contested that the child rolled down this bank. A rough plan was put in at the trial before Judge Thomas. That plan is not before this court. I would like once again to emphasize that those who bring appeals to this court should take steps to see that all evidence, documents, and so on, which were before the court below, are before this court.

The judge decided that the corporation were liable. The application for his notes was made some time after the hearing. There were sent to him, very properly and usefully, certain notes which the solicitors or counsel on one or both sides had made, and so we have the advantage of the notes which he made, having refreshed his memory by those documents. He said that he summarized his findings as follows : "The "tip in question was adjacent to the house where the child "resided and, in so far as it may be a question of fact, I find "further (1.) that the corporation knew, or ought to have "known, that children played there ; (2.) that the tip with "its bottles and cans constituted an 'allurement' ; (3) that "the child did not know or could not be taken to have know-

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(1) [1913] 1 K. B. 398.
(2) [1934] 2 K. B. 101.
(3) (1939) 83 S. J. 848.

C. A.

1950

WILLIAMS
v.
CARDIFF
CORPORATION.

Somervell L.J.

"ledge that there was any danger in playing on the tip. "I held, therefore, that the particulars of negligence set out "in the particulars of claim had been proved and that the "plaintiffs were entitled to judgment for the amount claimed."

Mr. Walters, on behalf of the corporation, pressed on us one point to which I will refer first. It was also, as the note shows, pressed on the judge. Mr. Walters said that the accident here was falling down the bank, and that the bank, being obvious, was something which could not be a trap or an allurement in the sense in which those words are used in this class of case; and that the accident was therefore caused by something which did not give rise to liability. If—and he disputed that this inference was one which could be drawn—the injury was due to glass, that was not the cause of the accident but the cause of the injury. There are two points there, and I will express my view about both of them. The medical report showed the nature of the injury to the child's nose, which required stitching as there was a laceration 1½ inches long. It is quite plain that that was the kind of injury or cut which might well be caused by a piece of broken glass. I think in those circumstances that, having regard to the evidence that there was broken glass about on this piece of waste land where children were allowed to play, the judge was entitled to draw the inference, which I think it plain that he must have drawn, that the injury was caused by the broken glass.

On the second point I cannot accept the distinction which Mr. Walters sought to draw, that the injury by glass was not the accident, but that the accident was rolling down the bank, so that this was an injury which, as it were, could be separated from the accident. The accident seems to me to be the single occurrence of rolling down the bank at the base of which there was a piece of broken glass on to which the child fell cutting his nose. On that view of the facts it seems to me impossible to say that the judge went wrong in law.

On the question of liability, I do not propose to review all the cases, but I will refer to one or two passages on which Mr. Walters particularly relied. He relied first on this statement by Scrutton L.J., in *Liddle* v. *Yorkshire* (*North Riding*) *County Council* (1). "In my opinion, to make the landowner "liable for injury to a child on his land, it must be proved that "he expressly or impliedly invited children on to his land,

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(1) [1934] 2 K. B. 101, 112, 122.

"and either did an act which caused damage with knowledge "that it might injure the children, or knowingly permitted "the existence on his land of a hidden danger or trap. The "invitation might be implied from knowledge that children "frequented the land without interference. For obvious "dangers, such as unguarded water, natural or artificial, "he will not be liable." That statement was quoted and applied in *Morley* v. *Staffordshire County Council* (1).

As it seems to me, there was clearly evidence here on which the county court judge could find that the existence of this broken glass on a piece of land on which children were constantly allowed to play, taken with the bank, as to which we have not the full evidence which was before him because we have not the plan, constituted a trap within the principles which have been laid down with regard to liability in the case of occupiers of land on which children are allowed by those occupiers to play.

The only criticism which I would make on his notes which, as he said, were made some two months after the hearing, is that I think that this was a trap rather than an allurement. I think that the word "allurement," as used in these cases, has been applied, or at any rate generally applied, to something like the turn-table in the Irish case—*Cooke* v. *Midland Great Western Railway Co.* (2)—that is to say, to something which would be attractive to children to play with, or like the red berries which the child ate in *Glasgow Corporation* v. *Taylor* (3), rather than to circumstances such as the present, where a local authority are in effect saying to children: "You can "come and play on this land," the land containing pieces of glass and possibly other objects such as tins which might be extremely dangerous if children fell down, as children are bound to do if allowed to play on the bank.

For these reasons, I think that this appeal must be dismissed.

JENKINS L.J. I agree. The evidence was such that it could reasonably be inferred that the injury sustained by the infant plaintiff, when he fell down the bank, was due to his cutting himself on a piece of broken glass or an old tin, or some such sharp object, with which this piece of waste ground was littered. It seems to me that, once that inference is drawn,

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(1) 83 S. J. 848.
(2) [1909] A. C. 229.
(3) [1922] 1 A. C. 44.

C. A.

1950

WILLIAMS v. CARDIFF CORPORATION.

Jenkins L.J.

there could be only one result to the case. In my judgment, a piece of waste land on which children are known to be in the habit of playing cannot be otherwise described than as containing hazards in the nature of traps or concealed dangers if it is littered with such objects as pieces of broken glass. From the point of view of an infant, I have no doubt that such objects, scattered about the ground, are traps or concealed dangers, whatever might be said of them from the point of view of an adult.

On that matter I only wish to refer to this concluding passage in the speech of Lord Sumner in *Glasgow Corporation* v. *Taylor* (1): " Where a question as to the care to be used " arises between persons using as of right the place, where " they respectively act, infancy as such is no more a status " conferring right, or a root of title imposing obligations on " others to respect it, than infirmity or imbecility; but a " measure of care appropriate to the inability or disability " of those who are immature or feeble in mind or body is " due from others, who know of or ought to anticipate the " presence of such persons within the scope and hazard of their " own operations." Applying that observation to this case, the corporation knew or ought to have anticipated the presence of young children on this piece of waste ground, and the standard of care due to such persons demanded that, unless and until the corporation took measures to prevent their presence on that ground, they should keep the ground free from traps or concealed dangers such as broken glass, the danger to be apprehended from which would clearly not be apparent to persons of tender years. I agree that the appeal fails.

ROMER J. I also agree. We are told that, at the date of the accident, the child was 4½ years of age, and that he was a licensee on the land of the corporation. In *Liddle* v. *Yorkshire* (*North Riding*) *County Council* (2) Greer L.J. referring to the speech of Lord Dunedin in *Robert Addie & Sons* (*Collieries*) *Ld.* v. *Dumbreck* (3), in which he cited with approval a passage in the judgment of Hamilton L.J., in *Latham* v. *R. Johnson & Nephew, Ld.* (4) said: " It is well established law that " licensees 'must take the premises as they find them apart " 'from concealed sources of danger; where dangers are

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(1) [1922] 1 A. C. 44, 67.

(2) [1934] 2 K. B. 101, 112, 122.

(3) [1929] A. C. 358, 371.

(4) [1913] 1 K. B. 398, 411.

C. A.

1950

WILLIAMS *v.* CARDIFF CORPORATION.

Romer J.

" ' obvious they must run the risk of them.' " Lord Dunedin was relating those observations to a claim which was made on behalf of a boy four years of age, and, therefore, they have considerable relevance to the claim in the present case. It is obvious, I think, that the mere presence of a grassy slope could not amount to a concealed danger, for it could be seen. What I think is equally clear on the evidence is that the presence of that slope, coupled with the presence of tins and broken glass and other material at the bottom of it, did amount, and the county court judge was right in so holding, to a concealed danger, which would result in the corporation's being liable for damage sustained by this infant plaintiff.

I agree, accordingly, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co. for S. Tapper Jones, Town Clerk, Cardiff; Stikeman & Co. for Phillips & Buck, Cardiff.*

J. L. D.

REX *v.* SOMERSET JUSTICES.

Ex parte ERNEST J. COLE & PARTNERS LD. AND ANOTHER.

1950 *Jan.* 17.

Lord Goddard C.J., Lynskey and Sellers JJ.

Crown practice—Mandamus—Quarter sessions—Appeal from justices—Matter not involving a conviction—Refusal of quarter sessions to grant application to state case—Whether compellable by mandamus.

Where, on an appeal to quarter sessions from the decision of a court of summary conviction in a matter not involving a conviction, quarter sessions decline to grant the application to them by a party aggrieved by their decision to state a case, the court of King's Bench has no power to issue an order of mandamus directing them to do so, since the granting of such an application is a matter entirely within quarter sessions' discretion. If, however, quarter sessions, after having granted an application to them to state a case, subsequently refuse to state it, they may be ordered to do so by mandamus.

APPLICATION for an order of mandamus.

The applicants, Ernest J. Cole & Partners Ld. and Mrs. Christine Helen Cole, the owners of property at Burnham-on-Sea, were served by Somerset county council in their capacity of town-planning authority under the Town and Country

Planning Act, 1947, with an enforcement notice under s. 23, sub-s. 2 of the Act, purporting to restrict the use of their premises. As permitted by sub-s. 4 of s. 23, the applicants appealed against the notice to a court of summary jurisdiction sitting at Burnham-on-Sea. The justices varied the notice in certain particulars not material to this report, and the applicants and the county council respectively appealed and cross-appealed against that decision. Quarter sessions dismissed the appeal of the applicants and allowed that of the county council. The applicants did not, at the time, apply to quarter sessions to state a case, but some three weeks later an application was made to them to do so. The application was refused by quarter sessions on the ground of the time which had elapsed between the hearing of the appeal and the application for the case. The applicants thereupon applied for an order of mandamus directed to quarter sessions to state a case.

Neligan for the applicants. It is submitted that the applicants are entitled to an order of mandamus directing quarter sessions to state a case, since the court of King's Bench has power to review the discretion exercised by them in refusing to do so. It is admitted that the old authorities, particularly *Rex* v. *Pembrokeshire Justices* (1) and *Ex parte Inhabitants of Jarvin* (2) appear to be against the applicants' contention on this point, but it is none the less submitted that the court may issue an order for mandamus by virtue of its inherent jurisdiction to control the discretion exercised by an inferior court.

Squibb for the county council and *J. F. E. Stephenson* for the justices of quarter sessions were not called on to argue.

Lord Goddard C.J. [after referring to the facts :] Quarter sessions allowed the appeal of Somerset county council and dismissed that of the applicants on June 7, 1949, and, according to the affidavit of the chairman, no application was then made to quarter sessions to state a case. Whether they would have stated a case or not if an application had been made, I do not know, but an application made to them some three weeks later was refused, and the chairman has told us that the refusal was because of the delay which had taken place. Now we are asked to grant a mandamus to quarter sessions compelling them to state a case.

(1) (1831) 2 B. & Ad. 391.

(2) (1840) 9 Dowl. 120.

Having been in the profession for a great number of years, I can only say that before the Criminal Justice Act, 1925, was passed I had always understood that there was no power in the court to grant a mandamus to quarter sessions compelling them against their will to state a case. It was often thought that that raised difficulties and might cause some injustice, and so by s. 20 of that Act it was provided that, after the determination by quarter sessions of an appeal against a conviction by a court of summary jurisdiction, either party could apply to quarter sessions for a case, and, if it were refused, might come to this court for an order of mandamus compelling them to state a case. That section, however, is confined to cases in which the matter is one involving an appeal to quarter sessions against a conviction by petty sessions, and the present case is not one of that nature. If it had always been inherent in this court to grant mandamus to quarter sessions to compel them to state a case, s. 20 would not have been necessary.

The history of the matter makes it clear that this court has never assumed, and has always disclaimed, the power to grant a mandamus to quarter sessions to state a case. The history of the power of quarter sessions to state a case is very fully discussed in the speech of Lord Cairns in *Walsall Overseers* v. *London and North-Western Railway Co.* (1). He points out that, as most of us know, the ancient history of quarter sessions shows that they were given power to consult the judges of assize. In fact, they were told not to proceed with a case of difficulty until the justices came into the county, which, of course, was equivalent to telling them that they could, and ought in proper cases, to consult the justices of assize before deciding a case of difficulty. Then it became the practice, instead of consulting the judge of assize, to consult the court of King's Bench; and whether they consulted that court or not was always a matter entirely for their discretion. This court has never assumed, so far as I can find, any power to grant a mandamus to them ordering them to consult the court, and, indeed, has expressly refused to assume that power.

The first case to which I think reference can conveniently be made is *Rex* v. *Pembrokeshire Justices* (2). The sidenote to that case states: "When the sessions on determining an "appeal have granted a case, but none has been stated, the "court will, under some circumstances, direct a mandamus

(1) (1878) 4 App. Cas. 30, 40.

(2) 2 B. & Ad. 391, 393.

1950

Rex
v.
Somerset
Justices.
Ex parte
Ernest J.
Cole &
Partners
Ld.

Lord Goddard
C.J.

"to the justices who heard the appeal, to state a case." Attached to that report is a report of "*Rex* v. *The Right Hon. the Earl of Effingham and Others*" in which an application was made to the court for a mandamus directed to the justices for the West Riding of Yorkshire "commanding them to state "a special case on an appeal between the inhabitants of "Northowram and the inhabitants of Hipperholme, determined by them at sessions, July 13 last; on affidavit, that, "the order being affirmed, the appellants desired a special "case to be stated, which the sessions unanimously consented "to." The report continues: "Mr. Heywood, counsel for the "appellants, drew the case; and in the afternoon both counsel "tendered the case to the sessions for their approbation. "Mr. Wickham and Mr. Horton, who joined in making the "original order, and Sir Watts Horton, who had an estate in "each parish, and therefore declined giving any opinion in "the morning, were the only justices remaining; when Sir "W. H. refused to permit the case to be stated; and he being "joined by Mr. Horton, no case was stated." In other words, quarter sessions in the morning had agreed to state a case, that is, they had granted a case. Then, when the case was tendered to the justices for signature, certain justices who obviously had an interest in the matter said that they were not going to state it. The justices who had granted the case had left, and the justices who remained refused to state it. The report says: "Lord Mansfield doubted whether a "mandamus could go to compel justices to state a case "but Buller J. saying that in this instance the court of quarter "sessions had actually agreed to state one, but Sir Watts "Horton prevented it"—he being a justice with an interest in the matter—"a rule nisi was granted," against the justices to state the case, they having agreed to do so.

There is other authority on the point in *Ex parte Inhabitants of Jarvin* (1). The sidenote states: "The court will not "issue a mandamus to a court of quarter sessions, commanding "them to grant a case, although under special circumstances "it may issue such a mandamus commanding the sessions to "state a case." Patteson J., who was a judge of great authority in these matters, said (2): "It seems to me that the "first case cited, *Rex* v. *Pembrokeshire Justices* (3), is no "authority for granting the rule. The case of *Rex* v. *Effingham* "is only an authority to show that the court will, under

(1) 9 Dowl. 120.
(2) Ibid. 122.
(3) 2 B. & Ad. 391, 393.

"special circumstances, grant a mandamus for the purpose "of compelling the sessions to state a case, but not to grant "it, that being a matter which is purely for their discretion." I note that the learned authors of Archbold's Quarter Sessions, which is, of course, a work of considerable authority, say (6th ed.) p. 442: "But it is perfectly optional with the sessions "whether they will thus state a special case or not; neither "the parties nor even the King's Bench Division itself can "compel them to do so." For that they cite *Ex parte Inhabitants of Jarvin* (1) and also *Peat's* case (2).

In view of the authorities to which I have referred, the court are of opinion that they have no power to grant mandamus in this case, and therefore this application fails.

LYNSKEY J. I agree.

SELLERS J. I agree.

Application refused.

Solicitors: *Arbeid & Co.; Sharpe, Pritchard & Co., for Harold King, Taunton; Collyer-Bristow & Co., for P. A. Selborne Stringer, Trowbridge.*

(1) 9 Dowl. 120.

(2) (1704) 6 Mod. 229.

P. B. D.

REX *v.* CLARKE.

C. C. A.
1950
Feb. 6, 13.
Humphreys, Hilbery and Sellers JJ.

Criminal law—Loitering with intent to commit a felony—"Suspected "person"—Proof by evidence of previous convictions—Police unaware of previous convictions at time of arrest—Firearms Act 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 12), *s.* 23, *sub-s.* 2—*Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4.

A person can properly be described as a "suspected person" within the meaning of s. 4 of the Vagrancy Act, 1824, by reason of his previous convictions, although the police officers who arrest him are unaware of them when doing so.

Ledwith v. *Roberts* [1937] 1 K. B. 232, and *Rex* v. *Fairbairn* [1949] 2 K. B. 690, discussed.

[Reported by Miss SHEILA COBON, Barrister-at-Law.]

C. C. A.

1950

REX
v.
CLARKE.

APPEAL against conviction.

The appellant was convicted at Middlesex Quarter Sessions of being in possession of an imitation firearm contrary to s. 23, sub-s. 2, of the Firearms Act, 1937. By that subsection, "if any person, at the time of his committing, or at "the time of his apprehension for, any offence specified in the "Third Schedule to this Act, has in his possession any . . . . "imitation firearm, he shall, unless he shows that he had it "in his possession for a lawful object, be guilty of an offence "under this sub-section . . . ." Among the offences specified in the Third Schedule are: "Offences under such of the "provisions of s. 4 of the Vagrancy Act, 1824, as are referred "to in, and amended by, s. 15 of the Prevention of Crimes "Act, 1871, and s. 7, of the Penal Servitude Act, 1891." Section 4 of the Vagrancy Act, 1824, as amended by s. 7 of the Penal Servitude Act, 1891, provides that "every suspected "person or reputed thief, frequenting or loitering about or "in any . . . . street, highway or place . . . . with intent "to commit felony . . . . shall be deemed a rogue and "vagabond." Section 15 of the Prevention of Crimes Act, 1871, provides that "in proving the intent to commit a felony "it shall not be necessary to show that the person suspected "was guilty of any particular act or acts tending to show his "purpose or intent, and he may be convicted if from the "circumstances of the case, and from his known character "as proved to the . . . . court before . . . . which he is "brought, it appears . . . . that his intent was to commit "a felony."

At about 2 a.m. on November 6, 1949, two police officers observed the appellant in different parts of the Great West Road for some twenty minutes, and saw him loitering in and about various streets in circumstances which, as the jury found, satisfied them that he was loitering with intent to commit a felony. They arrested him and found an imitation firearm on him. In order to establish that he was a "suspected person" it was proposed to prove against him at the trial two previous convictions for larceny and shop-breaking; but at the time of his arrest the police officers had been unaware of the previous convictions. Objection was taken to this course on behalf of the appellant, and the question of the admissibility of proof of the previous convictions was argued before any evidence was called and in the absence of the jury. The deputy chairman ruled that it was admissible. The prosecution did not rely on any evidence by the police of antecedent acts, and the case went to the jury on the footing that the appellant was a "suspected person" because of his previous convictions.

The appellant sought to have his conviction set aside on the ground that he could not be described as a "suspected "person" since the police who gave evidence of his loitering were unaware of his previous convictions at the time of his arrest.

Havers K.C. and *R. M. O. Havers* for the appellant. This appeal turns on the meaning which the court gives to the words "suspected person" in s. 4 of the Vagrancy Act, 1824. The question is whether a person, whose antecedent conduct does not make him a "suspected person," can be arrested by reason of his previous convictions which were unknown to the police when they arrested him. A person comes within the category of a "suspected person" in two ways: by his antecedent conduct, which may take place on the same day as, but must be separate and distinct from, the act giving rise to the arrest; and by his previous bad character which, it is submitted, must be known to the police at the time when they arrest him. Here the prosecution did not rely on evidence of antecedent conduct, and the case in the court below proceeded solely on evidence of his previous convictions, of which the police arresting him were unaware at that time. In *Rex* v. *Fairbairn* (1) the police officers making the arrest knew at the time of the accused person's previous convictions, and the present case is distinguishable on that ground. But the following observations of Lord Goddard C.J. in that case (2) support the appellant's contention that it is not enough for a man to have a bad character, but that it must be a bad character known to the police when they arrest him: "In the "particular case before us, the evidence of the police officers "was that they saw the appellant and two other men, all of "whom they knew to be suspected persons, and the reason "why the police knew that the appellant was a suspected "person was because he had been previously convicted. He "came, therefore, within the category of a suspected person. "That, however, would not of itself be enough because a man "with previous convictions cannot be arrested for dishonesty "merely because he is walking down a street. That, of course,

(1) [1949] 2 K. B. 690. (2) Ibid. 694.

"would be absurd. It is necessary to show that a man with "a bad character, and known to the police as a person with "a bad character, is acting in such a way as to justify an "arrest."

The powers of arrest without warrant conferred by the Vagrancy Act, which imposes a penalty on police officers who fail to perform their duty of arrest, are wide, and would be dangerous if they enabled the police to arrest persons about whom they know nothing. Their power is confined to the arrest of any person whom they honestly and reasonably suspect to have committed or to be about to commit a felony and who at the time of arrest fairly comes within the class of "suspected persons." In *Ledwith* v. *Roberts* Greer L.J. said (1): "The phrase 'a suspected person' . . . . is apt "to describe and to describe only a person who, quite apart "from the particular occasion and antecedently thereto, has "become the object of suspicion." *Hartley* v. *Ellnor* (2), in which it was held that, if there was sufficient evidence for suspicion against a person that he was frequenting a place with intent to commit a felony, it was unnecessary to adduce evidence of previous convictions, is still good law but is unnecessary for this decision. In *Rawlings* v. *Smith* (3) the defendant's previous convictions were unknown to the police until after his arrest, but unfortunately the point was never decided by the Divisional Court as neither side relied on it, and its only relevance is on the point of antecedent acts of the defendant. *Cohen* v. *Black* (4) also concerned antecedent acts, and it was there held that, in order to bring the alleged offender into the category of suspected persons, there must be evidence of antecedent acts giving rise to suspicion before the arrest. There is no distinction in principle between cases where evidence of antecedent acts is relied on and those in which it is sought to convict on evidence of previous convictions. Unless there is something which before the arrest excites the suspicion of the police officers, whether it be previous convictions or antecedent acts, a person is not a "suspected "person" and cannot lawfully be arrested or convicted.

J. M. G. Griffith-Jones for the prosecutor. If the argument advanced on the appellant's behalf were to succeed, the liability of a person to be arrested would depend on which police officer happened to see him loitering. An old lag

(1) [1937] 1 K. B. 254.
(2) (1917) 117 L. T. 304.
(3) [1938] 1 K. B. 675.
(4) (1942) 58 T. L. R. 306.

loitering in the West End and known to the police there could by going to the country loiter with impunity; even in the West End he could protect himself by choosing an area frequented by young and inexperienced police. Although the legislature is zealous to guard the subject's freedom from arrest, it also tries to protect the community from the depredations of thieves. It cannot have been intended that a guilty man loitering with evil intent should be free if the police officer watching him does not happen to know of his previous convictions. Further, as s. 15 of the Prevention of Crimes Act, 1871, allows evidence of previous convictions to prove the guilty intent, the result would be that evidence of previous convictions would be admissible for that purpose but must be discarded when deciding whether the appellant was a "suspected person." *Rawlings* v. *Smith* (1) is an authority in the prosecutor's favour. If Lord Hewart C.J. had thought material the fact that the police did not know of the accused person's previous convictions until after they had arrested him, he would surely have remarked on it. The passage from Lord Goddard C.J.'s judgment in *Rex* v. *Fairbairn* (2) relied on by the defendant must be read in the light of his remarks in the preceding paragraphs. Referring to Scott L.J.'s observations in *Ledwith* v. *Roberts* (3), where the Lord Justice obviously had it in mind that it would be possible to prove that a person was a "suspected person" by proving his previous record and character, Lord Goddard C.J. said (2): ". . . . as a matter of common sense that must be so. If "a man is found loitering in the street and acting in a suspicious "manner and it is also found that he has had half a dozen "previous convictions, obviously he can rightly be regarded "as a suspected person by reason of his previous convictions."

Havers K.C. replied.

Cur. adv. vult.

Feb. 13. Humphreys J. [reading the judgment of the court:] The sole point raised by this case is whether a person who loiters in a place specified in s. 4 of the Vagrancy Act, 1824, with intent to commit a felony can be properly described as a "suspected person" because he has been previously convicted of theft or dishonesty although the police officers who give evidence of his loitering with that intent are unaware of those previous convictions. [His Lordship stated the facts and continued :] The evidence objected to at the trial was plainly admissible upon the charge as evidence of intent to commit a felony, since s. 15 of the Prevention of Crimes Act, 1871, provides, that in proving the intent to commit a felony, it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and that he may be convicted if from the circumstances of the case, and from his known character as proved, it appears that his intent was to commit a felony. It was argued for the appellant on his trial, and the argument was repeated before us, that such evidence could not show that he was a suspected person within the meaning of the Vagrancy Act unless the previous convictions were known to the police officers who arrested him.

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(1) [1938] 1 K. B. 675.
(2) [1949] 2 K. B. 690, 694.
(3) [1937] 1 K. B. 232, 264.

It was apparently admitted by counsel for the prosecution that he could not rely upon the evidence of the police as proving antecedent acts of the appellant before the time when they, being satisfied that he was loitering with intent, arrested him. It would in fact have been better if that admission had not been made before the evidence had been called, because, in truth, when evidence was called on the deputy chairman's ruling that the evidence objected to was admissible, the police officers were able to give in evidence certain facts which might well have been found by the jury to be proof of antecedent acts of the nature referred to. Nor was it necessary that the argument should proceed in the absence of the jury, since the real objection was that the evidence, when given, did not create a prima facie case upon which the jury could find that the appellant was a "suspected "person." However, as the case went to the jury on the basis that the sole ground for alleging that the appellant was a "suspected person" depended upon his previous convictions, the appeal was argued on that footing.

The words "suspected person" in s. 4 of the Vagrancy Act, 1824 and their meaning have been discussed in many cases, to most of which we think it unnecessary to refer. No case has apparently been reported raising this particular point, but in our opinion there is nothing in the Act or in any of the authorities to which we were referred to suggest that the previous convictions must be known to the arresting officers in order to prove that as the result of those convictions the person convicted became a "suspected person." Any such decision would in our view tend to make the provisions of s. 4 useless, since a thief might change his venue and the places where he chose to loiter with sufficient frequency to make it unlikely that the local police officers would recognize him or know anything about him.

However, Mr. Havers relied on *Ledwith* v. *Roberts* (1), the facts of which were nevertheless very different from those in the present case. That was an appeal from a decision of the presiding judge of the Liverpool Court of Passage, who had held that the facts alleged in the defence to an action for wrongful imprisonment, even if proved, would afford no defence in law to the action. No evidence was called at that time, and the case was decided on the basis that the allegations in the defence were assumed to be true; and on that assumption the judge decided that they disclosed no defence in law. The case, however, is in our opinion the leading decision on the question of the meaning and effect of the words "suspected "person" in s. 4. Greer L.J., in the course of his judgment, observed (2): "In my judgment . . . . the special powers "given to constables are confined to a class of persons described "as 'suspected persons' or 'reputed thieves.' They can "only be apprehended without warrant if they already are "at the time of their arrest and imprisonment suspected "persons or reputed thieves. I do not think this means that "if the constable suspects the person whom he apprehends "he is entitled to arrest and imprison him without warrant . . . . "I think 'suspected person' means a person who has acquired "the character of a suspect." He adds (2): "In my judgment, "the powers of a constable to arrest without warrant are "confined to cases in which he finds frequenting or loitering, "etc., a person who has, by his previous conduct, become "a suspected person."

That case was followed in 1949 by *R.* v. *Fairbairn* (3), a case which came before this court. The headnote reads: "Evidence of a previous conviction is admissible to establish "that a person who is arrested under s. 4 of the Vagrancy "Act, 1824, on a charge of loitering with intent to commit "a felony, is a 'suspected person' within the meaning of the "section at the time of his arrest." Lord Goddard C.J., in delivering the judgment of the court, discussed many of the cases, including *Ledwith* v. *Roberts* (1). It is true that in that

(1) [1937] 1 K. B. 232.
(2) Ibid. 245.
(3) [1949] 2 K. B. 690.

particular case the evidence of the police officers was that they knew the two persons who were arrested as convicted persons; but the judgment of the court, in our opinion, clearly did not proceed upon the ground of their knowledge, and there are many passages in the judgment of Lord Goddard C.J., which are quite inconsistent with any such view. He observed that *Ledwith* v. *Roberts* (1) laid down that the conduct or character of the people concerned must be such that they come fairly within the category of being suspected persons, and added (2): "If people who have been previously convicted of theft are "found loitering in the streets and their conduct is such as "to give rise to a proper and reasonable suspicion that they "are there with the intention of committing a felony, they "are guilty of an offence under the Vagrancy Act, 1824, and "can be dealt with as suspected persons loitering with intent "to commit a felony." After observing that Scott L.J. in *Ledwith* v. *Roberts* (3) obviously had in mind the fact that it would be possible to prove that a person was a suspected person by proving his previous record and character, Lord Goddard C.J. added (2) "and as a matter of common sense that must "be so. If a man is found loitering in the street and acting "in a suspicious manner and it is also found that he has had "half a dozen previous convictions, obviously he can rightly "be regarded as a suspected person by reason of his previous "convictions." Later in his judgment there is the following expression of opinion (4): "It must, we think, be obvious "that the prosecution must be allowed to prove a man's "previous convictions, to show that he was a suspected person. "It is those previous convictions that make him a suspected "person and previous convictions can always be proved if "they are relevant to the charge before the court." No case was brought to our attention in which any judge has expressed any view as to the necessity for knowledge on the part of police officers of the past character of the accused person. In our opinion, those two cases show that such knowledge on the part of the police is irrelevant and certainly not essential. For those reasons this appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Solicitor, Metropolitan Police.*

(1) [1937] 1 K. B. 232.
(2) [1949] 2 K. B. 690, 694.
(3) [1937] 1 K. B. 232, 264.
(4) [1949] 2 K. B. 690, 695.

J. LYONS & CO. LD. *v.* HOME SECRETARY

1950
Jan. 18, 23.
Lord Goddard C.J.
Lynskey and Sellers JJ.

Emergency legislation — Requisitioning — Compensation—Requisitioned premises converted into air-raid shelter—Claim for compensation for period between derequisitioning and reinstatement of land—" Doing " of work " on land—" Damage to land "—Construction—Compensation (Defence) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 75), *ss.* 1, 2, 3, *sub-ss.* 3, 8 *—Requisitioned Land and War Works Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 17), *s.* 11, *sub-s.* 2.

Section 1 of the Compensation (Defence) Act, 1939, provides, among other things, that where, in the exercise of emergency powers, possession of any land has been taken or any work has been done on any land on behalf of His Majesty, then, with certain exceptions, compensation is payable in respect of that taking possession or doing of work. Section 2 of the Act fixes the amount of compensation payable in respect of the taking of possession of any land as the aggregate of four items including a sum equal to the cost of making good any damage to the land which may have occurred during the period for which possession is retained, unless made good during that period. Section 3, sub-s. 1, prescribes the compensation payable in respect of the doing of any work on any land as being a sum calculated by reference to the diminution of the annual value of the land ascribable to the doing of the work, which is to be paid " to the person who for the time " being is entitled to occupy the land." By s. 3, sub-s. 8 : " No " compensation under this section shall . . . . be payable in " respect of any period for which possession of that land is taken " on behalf of His Majesty in the exercise of emergency powers."

By s. 11, sub-s. 2, of the Requisitioned Land and War Works Act, 1948, " nothing in s. 3 " of the Act of 1939 " shall apply . . . . " to damage to land occurring while possession of the land is " retained."

In view of the wide definition of " doing work " in s. 17 of the Act of 1939, and of the fact that s. 3 only gives compensation where the annual value of land is diminished by the doing of work on it, " damage to land " in s. 11, sub-s. 2, of the Act of 1948 includes damage ascribable to the doing of work on the land. Moreover, " damage to land " means actual physical damage to the land or buildings on it. If, therefore, damage is done in the form of work done to land during a period while possession of the land is retained under requisition, no compensation is recoverable in respect of it even though its effects persist after possession has been given up by the requisitioning authority.

The Crown requisitioned the basement of premises in London under reg. 51 of the Defence (General) Regulations, 1939, and converted it into an air-raid shelter by building brick walls and executing other work. The premises were derequisitioned on July 26, 1945. The brick walls and other works were removed and the basement restored as far as practicable to its original

[Reported by Miss Sheila Cobon, Barrister-at-Law.]

1950

J. LYONS & CO. LD. *v.* HOME SECRETARY.

condition by May 28, 1946. The owners contended that they were entitled to compensation under s. 3, sub-s. 2, of the Act of 1939 in respect of the period from July 26, 1945, to May 28, 1946.

Held, that no compensation under s. 3 of the Act of 1939 was payable to the owners of the land for the period in question after the requisitioning had come to an end.

SPECIAL CASE stated by the General Claims Tribunal under s. 7 of the Compensation (Defence) Act, 1939.

On December 14, 1942, possession was taken by the Crown, under reg. 51 of the Defence (General) Regulations, 1939, of the basement of premises in Oxford Street, London, belonging to J. Lyons & Co. Ld., the claimants. During the period of requisition brick walls were built on, and other works were done to, the premises for their adaptation as an air-raid shelter. On July 26, 1945, possession was yielded up to the company at the end of the requisitioning. On January 3, 1946, St. Marylebone Borough Council, acting on behalf of the Crown and by agreement with the claimants, began the removal of those walls and works. The removal was completed and the basement restored as far as practicable to its original condition by May 28, 1946.

The question for the opinion of the court was whether, on those facts, the claimants were entitled to compensation under s. 3, sub-s. 2, of the Compensation (Defence) Act, 1939 (1) in respect of the diminution of the annual value of any part of their premises ascribable to the doing of the work during the period from the date when possession of the basement was yielded up to them to the date when the premises were restored so far as practicable to the condition in which they would have been but for the doing of the work.

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(1) Compensation (Defence) Act, 1939, s. 1, sub-s. 1: "Where, in "the exercise of emergency powers " . . . . (*a*) possession of any "land has been taken on behalf of "His Majesty, ... or (*c*) any "work has been done on any land "on behalf of His Majesty . . . . "then, subject to the following "provisions of this Act, compensation . . . . shall be paid . . . . "in respect of the taking possession of the land . . . . or the "doing of the work, as the case "may be."

Section 3, sub-s. 1: "Compensation under this Act in respect "of the doing of any work on any "land shall be payable only if "the annual value of the land is "diminished by reason of the "doing of the work."

Sub-s. 3: "If, at any time after "compensation . . . . has become "payable by reason of the doing of "any work on any land, a person "acting on behalf of His Majesty "—(*a*) causes the land to be restored, so far as practicable, to "the condition in which it would "be but for the doing of the work " . . . . the period in respect of "which compensation is payable " . . . . by reason of the doing of "the work shall end with the date "immediately preceding the date "on which the restoration is "completed . . . ."

Requisitioned Land and War Works Act, 1948, s. 11, sub-s. 2: "Nothing in s. 3 of the Act of 1939 " . . . . shall apply . . . . to "damage to land occurring while "possession of the land is "retained."

Salmon K.C. and *Ashworth* for the claimant company.
H. L. Parker for the Minister.

Cur. adv. vult.

Jan. 23. Lynskey J. [reading the judgment of the court, stated the facts, and continued :] The question submitted for the opinion of the court is whether on the facts stated the claimants are entitled to compensation under s. 3, sub-s. 2 of the Compensation (Defence) Act, 1939, during the period from the date when possession of the premises was yielded up to them to the date when they were restored so far as practicable to the condition in which they would be but for the doing of the work.

The question on the facts stated is : are the claimants entitled under s. 3 of the Act of 1939 to compensation for work done on their premises during the period while the Crown was in possession of them for the period after the Crown had yielded up that possession until the land was restored as far as practicable to the condition in which it would be but for the doing of the work, that is to say for the period from July 26, 1945, to May 28, 1946 ?

The answer to this question depends on what is the proper construction to be given to ss. 1, 2 and 3 of the Compensation (Defence) Act, 1939, as amended by s. 11, sub-s. 2 of the Requisitioned Land and War Works Act, 1948. Section 1 of the Act of 1939 provides that, where, in the exercise of emergency powers during the period of the emergency, (*a*) possession of any land has been taken on behalf of His Majesty ; or (*b*) any property other than land has been requisitioned or acquired on behalf of His Majesty ; or (*c*) any work has been done on any land on behalf of His Majesty (with certain exceptions which do not affect this case) " then, subject to " the following provisions of this Act, compensation assessed " in accordance with those provisions shall be paid, out of " moneys provided by Parliament, in respect of the taking "possession of the land the requisition or acquisition of the "property, or the doing of the work, as the case may be."

This section not only gives the subject a right to compensation for interference by the Crown with his proprietary rights, but also fixes that compensation and limits the right to compensation which he might have had at common law. However great the hardship that a subject may suffer as a result of the exercise by the Crown of these emergency powers, he has no redress apart from the compensation given to him by the Compensation (Defence) Acts.

Section 2 of the Act of 1939 purports to fix the compensation payable under the Act in respect of the taking possession of any land. Section 3 of the Act purports to fix the compensation payable in respect of "the doing of any work on any "land," and ss. 4, 5 and 6 purport to fix the compensation to be paid in respect of any property other than land which has been requisitioned or acquired on behalf of His Majesty.

By s. 2, sub-s. 1: "The compensation payable under this "Act in respect of the taking possession of any land shall be "the aggregate of the following sums." Then follow four heads, the first of which, (*a*), provides for payment of a sum equal to a reasonable rent payable under a lease on the terms in the Act set out, and the second head, (*b*) a sum equal to the cost of making good any damage to the land which may have occurred during the period for which possession is retained unless made good during that period, fair wear and tear, and damage caused by war operations, excepted. The third head, (*c*), refers to agricultural land, which does not arise here. The fourth head, (*d*), is a sum equal to the amount of any expenses reasonably incurred for compliance with directions given on behalf of His Majesty in connexion with the taking of possession of the land. If s. 2 were read alone it would seem clear that by its terms it fixed the total of the compensation payable in respect of the taking possession of any land.

Section 3 of the Act of 1939 provides for payment of compensation in respect of the doing of any work on any land, and fixes that compensation as being a sum calculated by reference to the diminution of the annual value of the land ascribable to the doing of the work, which is to be paid in instalments quarterly in arrear to the person for the time being entitled to occupy the land.

This compensation under s. 3 must be paid until either the land is restored so far as practicable to the condition in which it would be but for the doing of the work, or until a notice is served on the person for the time being entitled to occupy the land of an intention to discharge the liability by payment, not earlier than a specified date, of a lump sum equal to the amount of the depreciation in the value of any estate or interest which any person has in the land caused by the doing of the work. This is the effect of sub-ss. 2, 3 and 4 of s. 3. It will be noticed that the compensation is to be paid to "the "person who for the time being is entitled to occupy the "land," and that the notice is to be given to "the person for "the time being entitled to occupy the land." If possession of the land had been taken by or on behalf of the Crown there would be no person other than the Crown or its representatives who would be "for the time being entitled to occupy "the land," and this fact suggests that s. 3 refers to the doing of work on land of which possession has not been taken by the Crown.

The real difficulty in construing s. 3 arises from the provisions of sub-s. 8 of that section. It provides: "No com-"pensation under this section shall, in relation to any land, "be payable in respect of any period for which possession "of that land is taken on behalf of His Majesty in the exercise "of emergency powers."

It is argued for the claimants that the sub-section leads to the inference that, where works have been done on any land, compensation under s. 3 is payable during any period during which possession of the land is not retained by or on behalf of the Crown even although the works had been done while the land was in the possession of the Crown.

On the other hand it is argued that this sub-section is only intended to apply when work has been done on land which was not in the possession of the Crown but possession of which had subsequently been taken on behalf of the Crown, and that the real object of sub-s. 8 was to prevent double compensation from being payable during the period of possession.

It seemed to us that the sub-section was ambiguous and open to either interpretation as it stood in the Act of 1939. The question was, however, reconsidered by the legislature in 1948. The Requisitioned Land and War Works Act, 1948, by s. 11, sub-s. 2 provides "Nothing in s. 3 of the Act of 1939 shall "apply, or be deemed ever to have applied, to damage to "land occurring while possession of the land is retained." Unless it can be said that the "doing of work on land" is

1950

J. LYONS & CO. LD. *v.* HOME SECRETARY.

something different from "damage to land", this sub-section would seem to make it clear that no compensation is payable under s. 3 for works done during the period when possession was retained by or on behalf of the Crown. Having regard to the wide description of "doing work" in s. 17 of the Act of 1939 and to the fact that s. 3 only gives compensation where the annual value is diminished by the doing of the work, we are satisfied that "damage to the land" in s. 11, sub-s. 2 of the Act of 1948 includes damage ascribable to the doing of work on the land.

Further, in our view "damage to land" means physical damage to the land or houses or buildings on it; and if that damage occurs during a period while possession is retained, s. 3 of the Act of 1939 gives no compensation for that damage even although its effects may persist after possession has been yielded up.

Our answer, therefore, to the question submitted to us is that the claimants are not entitled to compensation under s. 3, sub-s. 2 of the Act of 1939 in respect of the diminution of the annual value of any part of their premises ascribable to the doing of work (during the period when the Crown was in possession) from the date when possession of the basement was yielded up to the date when the premises were restored as far as practicable to the condition they would be but for the doing of the work.

Judgment accordingly.

Solicitors: *Bartlett and Gluckstein; Treasury Solicitor.*

Affirmed [1950] 2 K. B. 194

1950
Feb. 13.

Devlin J.

STAG LINE LD. *v.* BOARD OF TRADE.

Shipping—Charterparty—Construction—Vessel to go "to one or two "safe ports East Canada . . . . place or places as ordered by "charterers"—Whether vessel an arrived ship on reaching port or berth—Meaning of "place or places."

A charterparty required a vessel to "proceed to one or two "safe ports East Canada or Newfoundland, place or places as "ordered by charterers and/or shippers," and there to load a cargo of pit-props. She was at first ordered to go to the port of

[Reported by Miss SHEILA COBON, Barrister-at-Law.]

Miramichi in East Canada, but, on her arrival there on August 6, 1947, she was told that she would be required to load at Millbank. As there was not then a berth ready at Millbank, she had to wait six days and did not begin her loading until August 12. The shipowners claimed demurrage for the period August 6–12.

1950

STAG LINE LD. *v.* BOARD OF TRADE.

Held, that the charterparty gave the charterers an express right to choose the " place " to which the vessel should go; that, on the true construction of the charterparty, " place " meant a place within a port as opposed to being merely an alternative expression to " port "; that accordingly the vessel was not an " arrived " ship until she reached her loading berth at Millbank on August 12, and the claim for demurrage failed.

ACTION.

The plaintiff company's vessel was chartered to the defendants, the Board of Trade, by a charterparty dated July 17, 1947, requiring her to " proceed to one or two safe " ports East Canada or Newfoundland, place or places as " ordered by charterers and/or shippers," and there to load a cargo of pit-props. The vessel was at first ordered to go to the port of Miramichi in East Canada, but, on her arrival there on August 6 ready to load, she was told that she would be required to load at Millbank. As there was not then a berth ready at Millbank she anchored off Chatham, which was the usual place in the Miramichi district at which loading vessels lie, and had to wait until August 12 before beginning her loading.

The shipowners claimed demurrage in respect of the period from August 6 to August 12, contending that, on the true construction of the charterparty, the vessel became an " arrived " ship on August 6 when she reached the port of Miramichi. The charterers denied any liability to pay demurrage on the ground that by the terms of the charterparty the vessel was not an " arrived " ship until she reached her berth at Millbank on August 12.

Mocatta for the shipowners.

E. W. Roskill for the charterers.

DEVLIN J. [stated the facts, read the relevant clause in the charterparty and continued :] Whether the vessel was an " arrived " ship or not depends on the construction of the charterparty. The principle of law which is applicable has not been disputed. It is that, if the berth at which the vessel ultimately has to load or discharge is named either in

1950

Stag Line Ld. v. Board of Trade.

Devlin J.

the charterparty or by virtue of a power of nomination expressly given by the charterparty, she is not an "arrived" ship until she arrives at the berth. If, on the other hand, there is no power of nomination expressly given, and no berth is named so that she goes to the berth ordered by the charterers merely by virtue of the implied right which they have to select the berth, then she becomes an arrived ship when she arrives at the place named in the charterparty, as the port.

The material words are: "and proceed to one or two safe "ports East Canada or Newfoundland, place or places as "ordered by charterers and/or shippers." There is no doubt at all that the charterers have an express right to give an order regarding a place. A place may mean a port: it may be used alternatively in "ports or places". It may also mean a place in a port, and is frequently used for that purpose as meaning a berth.

The question to be determined is, which is the meaning here? It is a short and not at all easy point of construction, and in the course of the argument my mind has wavered. When parties use cryptic language these difficult points of construction necessarily arise. I think that Mr. Roskill's construction is the one which best conforms to the language. Mr. Mocatta's construction, which requires me to read the word "place" as an alternative to port, means that the clause is to read as if it were, "one or two safe ports or places "East Canada or Newfoundland as ordered by the charterers." That requires altering the arrangement of the words and ignoring the comma which separates the words relating to ports from those relating to place or places.

After careful consideration of the other clauses in the charterparty, I do not think that there is sufficient ground for taking that course. It ultimately depends upon the material words quoted, and on those words I think that the view advanced for the charterers is the better one: that what the parties were endeavouring to say was that the ship might go to one or two safe ports in East Canada or Newfoundland and that then, within those ports, the charterers would order the place or places to which the vessel was to go.

If "places" had been intended merely as an alternative to "ports," it would have been very easy, and the usual course, to have said, "one or two safe ports or places." I feel that, by adopting the phraseology which they did, the parties

1950

STAG LINE LD. *v.* BOARD OF TRADE.

Devlin J.

must have intended something more than that. Since I accept the charterers' construction of the charterparty, so that the ship was not an arrived ship until they exercised the express right of nominating a place or berth and she arrived there, it follows that the defence succeeds and that the claim for demurrage fails.

Judgment for the defendant charterers.

Solicitors: *Holman, Fenwick and Willan; the Treasury Solicitor.*

PACEY *v.* ATKINSON.

1950

Jan. 19, 23.

Lord Goddard CJ.
Lynskey and Sellers JJ.

Solicitor—Debt collector not legally qualified—Authorization by principal to take proceedings in court—Payment solely by commission on sum collected or recovered—Preparation of particulars of claim—Instrument prepared " in expectation of any fee, gain or reward "—Offence—Solicitors Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 47, *sub-s.* 1 *—Solicitors Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 46), *sch. III.*

By s. 47, sub-s. 1, of the Solicitors Act, 1932, (as amended by sch. III to the Solicitors Act, 1941), " Any person, not being a " barrister, or a duly certificated solicitor " or other qualified person as specified in the section, " who, unless he proves that the " act was not done for or in expectation of any fee, gain, or " reward . . . . draws or prepares any instrument relating " to . . . . any legal proceeding " is liable to a fine.

A rent and debt collector who had none of the legal qualifications specified in s. 47, sub-s. 1, was employed by landlords and creditors to collect money due to them, and was remunerated by a commission on the amount recovered by him whether by legal process or not. He was authorized by his principals to take proceedings in the county court when necessary and for that purpose he prepared particulars of claim. He received no specific fee beyond his commission for the preparation of documents or his attendance at court.

Held, that the collector had drawn or prepared legal instruments in the expectation of a fee, gain or reward and was therefore guilty of an offence under the amended provisions of s. 47, sub-s. 1, of the Solicitors Act, 1932.

CASE STATED by Darlington justices.

Six informations were preferred by the appellant, F. W. B. Pacey, acting on behalf of the Incorporated Law Society

1950

PACEY
v.
ATKINSON.

against the respondent, V. C. Atkinson, under s. 47, sub-s. 1, of the Solicitors Act, 1932, as amended by the Solicitors Act, 1941, sch. III(1), " for that he not being a barrister, or a duly " certificated solicitor, solicitor in Scotland, writer to the " signet, notary public, conveyancer, special pleader or " draftsman in equity drew an instrument relating to a legal " proceeding namely particulars of claim in the Darlington " county court." In the alternative the informations charged the defendant with having prepared the same instruments contrary to the section.

At the hearing before the justices the following facts were proved or admitted: the defendant had for a number of years carried on business as a collector of rents and debts in and around Darlington. He had none of the qualifications specified in s. 47, sub-s. 1, of the Solicitors Act, 1932, as amended by the Solicitors Act, 1941. In the course of his business he received instructions from a creditor or landlord direct, or from an estate agent acting on behalf of the creditor or landlord, to collect either a specified sum of money or, in the case of rent, the amount due or any arrears. In each case he received authority from his principal to institute and carry through proceedings in the county court in order to recover the sums of money outstanding. The defendant was remunerated by payment of a commission of 2½ per cent. on each sum of money that he was successful in collecting, whether as the result of legal proceedings or not; but when he was acting on behalf of an estate agent the commission was shared equally with the agent. In no event did the amount of the defendant's remuneration bear any particular relation to the amount of work performed in collecting the sum due, nor did any part of the remuneration bear any relation to the preparation or drafting of any particular document. He drew the particulars of claim in the six cases referred to in the informations, five of those claims being for rent and the remaining one for a debt due. In all the cases the defendant had been paid, or expected to be paid, the commission to which he was entitled at the agreed rate. Apart from such remuneration, he neither received nor expected to receive any reward for drawing the particulars of claim, for any of his work in connexion with the proceedings in question, or for his attendance in the county court. Evidence was given that it had been a common practice in the district for a number of years for unqualified debt collectors to take proceedings in the county court for the recovery of small debts on behalf of creditors, and that, so far as was known, no county court judge or court official had objected to the procedure.

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(1) The Solicitors Act, 1932, s. 47, sub-s. 1, as amended by sch. III to the Solicitors Act, 1941: " Any person, not being " a barrister, or a duly certificated " solicitor, solicitor in Scotland, " writer to the signet, notary " public, conveyancer, special " pleader, or draftsman in " equity, who, unless he proves " that the act was not done for " or in expectation of any fee, " gain or reward, either directly " or indirectly, draws or prepares " any instrument relating to real " or personal estate, or any legal " proceeding, shall be liable on " summary conviction to a fine " not exceeding fifty pounds."

The justices were of opinion that the defendant had drawn the instruments relating to the legal proceeding specified in each of the informations, but stated that he had satisfied a majority of them that he did not draw them directly or indirectly for or in expectation of any fee, gain or reward. They accordingly dismissed all the informations. The prosecutor appealed.

Cumming-Bruce for the prosecutor. The justices were wrong in dismissing the informations against the defendant. The words " for or in expectation of any . . . . gain or reward " in the section are wide enough to include the defendant in their terms. It is conceded that he was not preparing the documents which he drew up for a fee ; but he was clearly preparing them in the " expectation " of gain. The particular gain which he would receive would only be paid to him if he were successful in legal proceedings which he had undertaken on behalf of someone else. From that point of view such proceedings were obviously objectionable because it is clearly wrong that an unqualified agent should be connected with the bringing of legal proceedings on behalf of a creditor and that his remuneration should depend on the success of the proceedings. There is the further objection in principle to the procedure employed by the defendant that, if authorized, it would result in there being attached to the courts a class of persons whose business it was to undertake legal proceedings on behalf of other persons in the hope of receiving gain only if the proceedings proved successful, and who themselves are not officers of the court or subject to any legal discipline.

Hogg for the defendant. The justices were right in dismissing the informations. A somewhat similar question to that in the present case was raised in *Skittrell* v. *Showell* (1) under s. 54 of the Watermen's and Lightermen's Amendment Act, 1859, and the decision in that case is an authority in favour of the defendant. The right view of s. 47, sub-s. 1, of the Solicitors Act, 1932, as amended, is that the fee, gain or reward referred to must be one which relates directly or specifically to the service performed for such fee, gain or reward. If what is done by the person charged is not directly related to the fee or gain, it does not come within the words of the section. Unless there is some contractual right to a fee or reward for doing some act which is prohibited by the section, no offence is committed under it.

Cur. adv. vult.

Jan. 23. LORD GODDARD C.J. read the judgment of the court which, after stating the facts and the terms of the material section, continued: The magistrates appear to have received evidence that for many years past it had been a common practice for debt collectors to take proceedings on behalf of their principals in the county court and prepare the necessary documents, which would, of course, include particulars of claim, and that this had been done without any objection by the county court judge or registrars. This evidence was quite irrelevant and ought not to have been admitted. Whatever practice may have existed, the only question is whether this action on the part of the defendant is prohibited by the statute, as it is hardly necessary to say that he holds none of the qualifications mentioned in the section. At the same time it is well known that this practice has existed in all parts of the country; and the question is therefore one of considerable importance not only to rent and debt collectors but to the owners of property who employ them and who, if the statute prohibits collectors from taking these proceedings in the county court on behalf of their principals, will have either to do the work themselves or employ solicitors, with the result that costs in many cases will be incurred which the debtors will have to pay. We are not, however, concerned with either the policy or the result of the Act. All we have to say is whether on the true construction of the section this action on the part of the defendant is prohibited.

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(1) (1889) 61 L. T. 874.

I may say in passing that the only change which was effected in s. 4 of the Act of 1932 by the Act of 1941 was to cast the onus of proving that he did not act for or in expectation of any fee, gain or reward on the party proceeded against; and in this case no point as to onus of proof arose. The defendant gave evidence, and all the facts were therefore before the court. In our opinion it is clear that he must be held to have prepared these county-court documents in expectation of reward because, if judgment were recovered and money were paid under it, he would receive remuneration in the shape of commission on the sum recovered. True, he received no fee; nor did he expect to receive one; but that he expected to gain thereby and obtain a reward seems to us to be beyond question.

Mr. Hogg argued, and this was really the whole point of his argument, that there must be some contractual right to receive a fee or other remuneration, and that, unless there were some such contractual right, no offence was committed. We think that the short answer to that point is that the section provides that the act must not be done for or in expectation of any fee, gain or reward, and that the word "expectation" clearly indicates that there need be no legal right to recover, but merely an expectation or hope that some reward will be forthcoming as a result of the action taken.

On these short grounds we are of opinion that the offences were proved; and the case must be sent back to the justices with an intimation that convictions must be recorded on all the charges. The appeal is therefore allowed.

Appeal allowed.

Solicitors: *Hempsons; Butte and Bowyer for J. F. Latimer and Hinks, Darlington.*

P. B. D.

Applied. **Ferguson** v. **Weaving** [1951] 1 K. B. 814

1950
Jan. 19.

Lord Goddard C.J.
Humphreys and Lynskey JJ.

JOHNSON *v.* YOUDEN AND OTHERS.

Criminal law—Aiding and abetting—Mens rea—House sold above permitted price—Solicitors acting for vendor—Whether guilty of offence—Building Materials and Housing Act, 1945 (9 & 10 *Geo.* 6, *c.* 20), s. 7, *sub-s.* 1.

A builder offered a house for sale, and obtained from the purchaser 250*l.* which was to be in addition to the price permitted by law. The builder instructed a firm of solicitors to act for him in the sale. Two of the partners did not know that the builder had received the extra 250*l.*; but just before completion the third partner heard about that payment. He called upon the builder for an explanation, read the Building Materials and Housing Act, 1945, formed the opinion that the receipt of the extra 250*l.* was in the circumstances lawful, and called on the purchaser to complete. The builder was convicted under s. 7, sub-s. 1, of the Building Materials and Housing Act, 1945, of offering the house for sale at a price in excess of that permitted. The three partners were charged with aiding and abetting him in the commission of that offence.

Held, (1.) that, inasmuch as, before a person can be convicted of aiding and abetting the commission of an offence, he must at least know the essential matters which constitute that offence; therefore, as the first two partners did not know of the extra 250*l.* which was an essential fact constituting the offence of offering the house for sale at an excessive price, they were not guilty of aiding and abetting it; but (2.) that inasmuch as ignorance of the law is no defence, as the third partner knew of the 250*l.* before completion, he was guilty of aiding and abetting the offence notwithstanding that he had not realized the payment of the 250*l.* to be unlawful.

CASE STATED by Dover justices.

One Dolbear, a builder, built a house under the authority of a licence granted under a Defence Regulation subject to a condition limiting the price for which the house might be sold to 1,025*l.* The builder induced a purchaser to agree to pay for the house 250*l.* in excess of the price permitted. That 250*l.* was paid to the builder in advance. He then instructed a firm of solicitors, in which the three defendants were partners to act for him in the sale. He concealed from the defendants the fact that he had received the additional 250*l.*, and the first two defendants did not know of it at any material time. On April 6, 1949, however, the purchaser's solicitors wrote a letter to the third defendant stating that they had not proceeded to completion because the builder was in breach of s. 7 of the Building Materials and Housing Act, 1945 (1). The third defendant sought an explanation from the builder, who said that he had placed the 250*l*. in question in a separate deposit account, and that it was to be spent on payment for work, as and when he would be able lawfully to execute it in the future, on the house on the purchaser's behalf. The third defendant accepted that explanation, and, having read the Act of 1945, formed the opinion that the payment of 250*l*. was lawful and called on the purchaser to complete.

The builder was charged on information with offering to sell the house for a greater price than that permitted, contrary to s. 7, sub-s. 1, of the Building Materials and Housing Act, 1945; and informations were preferred against the three defendants charging them with aiding and abetting him in the commission of that offence.

On July 5, 1949, the builder was convicted, but the justices dismissed the three informations against the other defendants as they were of opinion that mens rea was a constituent of the offence of aiding and abetting an offence under s. 7, sub-s. 1, of the Act of 1945. They found that the third defendant honestly believed the explanation given to him by the builder regarding the 250*l*.

The prosecutor appealed.

Paget K.C. and *Edgar Bradley* for the prosecutor. The prosecution was under s. 5 of the Summary Jurisdiction Act, 1848 (2), as applied to s. 7, sub-s. 1, of the Building Materials

(1) Building Materials and Housing Act, 1945, s. 7, sub-s. 1: "Where a house has been constructed under the authority of a licence granted for the purposes of a Defence Regulation . . . . and the licence . . . . has been granted subject to any condition limiting the price for which the house may be sold . . . . any person who, during the period of four years beginning with the passing of this Act, sells or offers to sell the house for a greater price than the price so limited . . . . shall be liable on summary conviction to a fine . . . . or to imprisonment . . . ."

Sub-section 5: "In determining for the purposes of this section the consideration for which a house has been sold or let, the court shall have regard to any transaction with which the sale or letting is associated . . . ."

The Act was passed on December 20, 1945.

(2) Summary Jurisdiction Act, 1848, s. 5: "Every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction shall be liable to be proceeded against and convicted for the same . . . ."

and Housing Act, 1945. The justices formed the view (1) that the offence of aiding and abetting involved mens rea, and (2) that the burden of proving mens rea was on the prosecution. They were clearly wrong: mens rea is irrelevant. Mens rea is not an essential ingredient of the offence of aiding and abetting the commission of a substantive offence of which mens rea is not a necessary ingredient. Section 7, sub-s. 1, of the Act of 1945 absolutely prohibited the sale of a house at a price in excess of that permitted. Where a house is sold for an excessive price both the seller and the buyer commit an offence, although the buyer does not know of the prohibition. The Act was passed to cure the mischief of speculation in new housing property.

[Humphreys J. The only question that the court has to determine is whether aiding and abetting involves mens rea.]

[Lord Goddard C.J. How can one aid and abet an offence of which one does not know?]

One can conspire to commit such an offence: *Rex* v. *Clayton* (1). A fortiori one can aid and abet it.

Bassett for the defendants [called on to argue only on the question of the liability of the third defendant.] If the facts told by the builder to the third defendant had been true, no offence would have been committed.

Lord Goddard C.J. Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is not a defence. If a person knows all the facts and is assisting another person to do certain things, and it turns out that the doing of those things constitutes an offence, the person who is assisting is guilty of aiding and abetting that offence, because to allow him to say, "I knew of all those facts but I did not know "that an offence was committed," would be allowing him to set up ignorance of the law as a defence.

The reason why, in our opinion, the justices were right in dismissing the informations against the first two defendants is that they found, and found on good grounds, that they did not know of the matters which in fact constituted the offence ; and, as they did not know of those matters, it follows that they cannot be guilty of aiding and abetting the commission of the offence.

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(1) (1943) 65 T. L. R. 329, n.

With regard to their partner, the third defendant, a different state of affairs arises. His client, the builder, told him a story which, even if it were true, was on the face of it obviously a colourable evasion of the Act. The builder told him that he had received another 250*l.*, that he had placed the sum in a separate deposit account, " and that it was to be spent on " payment for work as and when he, the builder, would be " lawfully able to execute it in the future on the house on " behalf of the said purchaser." It seems impossible to imagine that anyone could believe such a story. Who has ever heard of a purchaser putting money into the hands of the builder when he bought a house from him because he might want some work done thereafter ? Surely, if the builder did not think that the purchaser could pay for the work, he would say : " Will you pay something on account ? " A story of that kind, on the face of it, is a mere colourable evasion of the Act.

It is more than likely, I think, that, in reading the Act, the third defendant did not read as carefully as he might have done sub-s. 5, of s. 7. If he had read that subsection carefully, I cannot believe that he—or indeed any solicitor, or even a layman,—would not have understood that the arrangement which the builder said that he had made was just the kind of thing which that sub-section prohibited.

How could anybody say that the story which the builder told the third defendant was not a story with regard to a transaction with which the sale was associated ? If that sub-section had been read by the third defendant and appreciated by him, he would have seen at once that the extra 250*l.* which the builder was obtaining was an unlawful payment ; but unfortunately he did not realize it, but either misread the Act or did not read it carefully ; and the next day he called on the purchaser to complete. Therefore he was clearly aiding and abetting the builder in the offence which the latter was committing.

The result is that, as far as the first two defendants are concerned, the appeal fails and must be dismissed ; but as far as the third defendant is concerned, the case must go back to the

1950

JOHNSON
v.
YOUDEN.

justices with an intimation that an offence has been committed, and that he must be convicted.

HUMPHREYS, J. I agree.

LYNSKEY, J. I agree.

Appeal allowed in part.

Solicitors: *Wilkinson, Howlett and Moorhouse; William Charles Crocker.*

R. P. C.

C. A.

1950

Feb. 8, 17.

Cohen and
Asquith L.JJ.
and Roxburgh J.

LUCAS *v.* LINEHAM.

Landlord and tenant—Rent restriction—Recovery of possession of house without offer of alternative accommodation—Occupation by statutory tenant—Purchase by landlord's wife after material date—Lease by wife to landlord subject to statutory tenancy—Landlord's claim to possession for own use—Whether tainted with wife's disability as purchaser after material date—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*f*)—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *sch.* I (*h*).

In July, 1947, the wife of the plaintiff landlord purchased a controlled dwelling-house which was in the occupation of the defendant, a statutory tenant. She was therefore, by reason of s. 3 of, and para. (*h*) of sch. I to, the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, debarred from claiming recovery of possession of the house for occupation by herself as a residence without proof of suitable alternative accommodation, she having become landlord by purchase after the material date, September 1, 1939. In August, 1949, the wife leased the premises to her husband, subject to the defendant's statutory tenancy, and he brought the present action to recover possession of the house as a residence for himself.

Held, that the landlord, deriving his title from a predecessor who was a disqualified purchaser, was himself tainted with the same disqualification, and was thus debarred from recovering possession without proof of alternative accommodation.

Semble, the definition "'landlord' . . . . includes any "person from time to time deriving title under the original "landlord" in s. 12, sub-s. 1 (*f*) of the Act of 1920 is apt to describe an intermediate landlord, the immediate predecessor in title of the plaintiff landlord.

Littlechild v. *Holt,* ante, p. 1, explained and applied.

APPEAL from Croydon county court.

In about 1932 a dwelling-house was purchased by a firm which on August 14, 1946, by a written lease let it to the defendant Lineham for three years. On August 14, 1949, when that lease expired, the tenant became a statutory tenant, if he had not done so earlier. On July 21, 1947, the firm sold the house to the wife of the plaintiff landlord. By an agreement dated August 30, 1949, she granted her husband a lease for three years, subject to the statutory tenancy; and he desiring possession of the premises for his own occupation, brought the present proceedings in Croydon county court for possession under para. (*h*) of Sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (1).

The county court judge, Sir Gerald Hurst K.C., came to the conclusion that the greater hardship would be caused by refusing an order for possession, and he granted the plaintiff possession of the house, subject to a suspension for seven months. The defendant appealed.

Michael Eastham and *C. Sherwood* for the defendant.

John Perrett for the plaintiff.

The arguments sufficiently appear from the judgment of the court.

Cur. adv. vult.

Feb. 17. ASQUITH L.J. [reading the judgment of the court, stated the facts, read para. (*h*) of sch. I, and continued :]

(1.) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sch. I : "A court shall, for "the purposes of section three of "this Act, have power to make or "give an order or judgment for "the recovery of possession of "any dwelling-house to which "the principal Acts apply or for "the ejectment of a tenant "therefrom without proof of "suitable alternative accom"modation (where the Court "considers it reasonable so to "do) if (*h*) the dwelling-house is "reasonably required by the "landlord (not being a landlord "who has become landlord by "purchasing the dwelling-house "or any interest therein after "[September 1, 1939]) for "occupation as a residence for "(i) himself . . . . Provided that "an order or judgment shall "not be made or given on any "ground specified in para. (*h*) "of the foregoing provisions of "this schedule if the court is "satisfied that having regard to "all the circumstances of the "case, including the question "whether other accommodation "is available for the landlord "or the tenant, greater hardship "would be caused by the granting "of the order or judgment than "by refusing to grant it."

The defendant does not question the county court judge's finding of fact that it would cause the landlord greater hardship in this case to refuse an order for possession (due regard being had to the seven months' suspension) than it would cause to the tenant to grant such an order; nor does he dispute that if the plaintiff can in other respects bring himself within para. (*h*) it was reasonable to make the order. What the defendant argued below, and argued as appellant in this court, was that the plaintiff was disabled from taking advantage of this provision. He relied for this purpose on the words in para. (*h*) itself, which exclude from the class of landlords who can avail themselves of it any landlord " who has become " a landlord by purchasing the dwelling-house or any interest " therein after September 1, 1939." The defendant does not argue that the plaintiff falls directly within the class of persons disabled by these words; that is, that the plaintiff was himself a " purchaser ": the argument is that the plaintiff derived his title as landlord from a person who was so disabled, and is therefore tainted with the disability of his predecessor in title. Before, however, considering whether the disqualification can be transmitted in the manner suggested, it is necessary to consider the nature of the disqualification itself and the class whom it primarily affects. The words attaching the disqualification have on several occasions been considered by this court. The decisions may be taken in chronological order. Mostly they decide who does *not* fall within the disqualified category.

In *Epps* v. *Rothnie* (1) the Court of Appeal decided that a purchaser after the material date—September 1, 1939—of premises which were unoccupied at the time of the purchase, who lets them later to the defendant, does not fall within the exception and is not disabled from claiming possession under para. (*h*): for, since the premises were unlet at the date of the purchase, the purchaser cannot be a landlord " who has " become landlord by purchasing."

In *Fowle* v. *Bell* (2) this principle was extended so as to exclude from the disqualified class of landlords persons who, purchasing the dwelling-house after the material date, nevertheless purchase it at a time when the sitting tenant is someone other than the defendant, but subsequently, on the premises falling vacant, let them to the defendant.

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(1) [1945] K. B. 562.

(2) [1947] K. B. 242.

Powell v. *Cleland* (1) is a case which proceeded on facts practically identical with those of the present case. A limited company acquired premises at some unascertained time before 1941. In 1941 the company let them to the defendant, Mrs. Cleland, who became a statutory tenant. In 1946 the company executed (in favour of the plaintiff Powell) a reversionary lease dependent on the defendant's statutory tenancy, as in the present case. It was not doubted that Powell thereby became the " landlord " of Mrs. Cleland. The question was whether Powell was a landlord who had " become landlord " by purchasing the dwelling-house or any interest therein " after September 1, 1939," and was therefore disqualified from relying on para. (*h*) of the schedule. The Court of Appeal held that he was not, because he had not purchased the premises or any interest therein. The material part of the headnote reads as follows : " The word ' purchasing ' in para. (*h*) is " used with the ordinary, popular but precise meaning of that " word—namely, the buying of a dwelling-house or of any " already existing interest therein. It does not in that para- " graph connote the acquisition for money or money's worth " of some interest which only comes into existence by the " very transaction. The meaning of the word cannot be " derived from the definitions of the word ' purchaser ' con- " tained in the several Property Acts of 1925, since (1.) those " definitions are not in each case the same and there is no " reason for selecting one rather than another, and (2.) the " Property Acts of 1925 and the Rent Restriction Acts are " not in pari materia. Accordingly, where the landlord of " a quarterly tenant of a dwelling-house, who has become " a statutory tenant under the Rent Restriction Acts, grants " a lease of the dwelling-house to X. from year to year (subject " to the rights of the sitting tenant), at a rent, but without " payment of any premium or other monetary consideration, " so that X. becomes lessee of the reversion expectant on the " statutory tenancy and the landlord of that tenant within " the meaning of the Rent Restriction Acts, and X., claiming " that he reasonably requires the house for occupation as " a residence for himself, sues the tenant to recover possession " of the house, X. has not become landlord by ' purchasing ' " the dwelling-house or any interest therein within the meaning " of para. (*h*)."

The court thus held that purchasing meant " buying " in

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(1) [1948] 1 K. B. 262.

C. A.

1949

Lucas
v.
Lineham.

the popular sense, and was not a term apt to describe acquiring a lease of a reversion dependent on an existing tenancy, unless indeed a premium—that is, a purchase price—were paid for the reversionary lease.

The procedure adopted in the present case is precisely that which might be expected to be adopted by a plaintiff who has, or whose legal advisers have, imbibed the lessons of *Powell* v. *Cleland* (1), and who, by following the same procedure, hopes or hope to achieve the same result. One thing is clear, and was, very reasonably, conceded on behalf of the defendant, namely, that *Powell* v. *Cleland* (1) precludes him from contending that the plaintiff in this case is himself what may be called for short a " disqualified purchaser " within the exception to para. (*h*). The way in which the defendant puts his case is somewhat different, and depends on a later decision of the Court of Appeal, *Littlechild* v. *Holt* (2). In that case one Littlechild bought in 1944 a house occupied by one Mills, a statutory tenant. Littlechild was therefore himself a " disqualified purchaser," and could not have availed himself of para. (*h*) to obtain possession without offering suitable alternative accommodation. He nevertheless sought to bring such an action against the defendant, who was Mills' successor in title as tenant. Littlechild died before judgment, but his widow obtained letters of administration and was enabled to continue the action. It was held that the widow was in no better position as a plaintiff than her late husband, and inherited or shared his inability to rely on para. (*h*).

In the course of the leading judgment Lord Goddard C.J. said (3) : " The question then arises—and this is the point " on which this court disagrees with the county court judge " —whether Mrs. Littlechild is in a better position than her " husband would have been. It certainly would be a very " remarkable hiatus in the Act if she were. This provision " that a landlord who has become landlord by purchasing the " house after December 6, 1937 "—that was the material date for the house in question in that case—" cannot obtain " an order for the recovery of possession of a dwelling-house " without proof of suitable alternative accommodation was " inserted in the Act for the protection of the tenant. The " ' tenant ' is, of course, a convenient expression, but it is the " expression used all the way through the Acts as meaning

(1) [1948] 1 K. B. 262.

(2) Ante, p. 1.

(3) Ante, pp. 5, 6.

"the person who is holding the property. It would certainly "be somewhat remarkable if the tenant were protected against "a landlord, who himself had sought to recover possession "of the house, but was not protected because the landlord had "died and his interest had passed over on an intestacy or by "will to his wife or to some other person. The sitting tenant "admittedly has that protection as long as the person who "bought the property since December 6, 1937, remains the "landlord of the property, but the moment he has disposed "of his interest in the property otherwise than by sale, it is "said that the new landlord has this right, which the former "landlord had not got."

Lord Goddard C.J. goes on to distinguish *Baker* v. *Lewis* (1) and *Fowle* v. *Bell* (2) thus (3): "The persons who succeeded "to the property by will in those cases took the property "from a person whose title had not the clog on it (if I may use "that expression) that was on Mr. Littlechild's title in this "case." There was nothing to show (in other words) that the testator in either of these cases was a "disqualified purchaser" within para. (*h*).

"But in this case," Lord Goddard C.J. continued, "the "landlord from whom Mrs. Littlechild acquired title was in "the position that his title was, as I have said, clogged: he "could not apply for possession because of the provision in "para. (*h*)." This conclusion of Lord Goddard C.J. appears to base itself on principle—the principle nemo dat quod non habet. What follows is, in our view, a makeweight and an afterthought, not the basis of the whole decision. He goes on to claim support for his conclusion from the terms of s. 12 (1) (*f*): but, in our view, as has just been indicated, the terms of his judgment imply that he would have decided the case in the same sense if s. 12 (1) (*f*) had not existed. Nor would Birkett J.'s judgment seem to rest on that provision, though the judgment of Denning L.J. may in part do so. We will revert to s. 12 (1) (*f*) in a moment.

We think that this decision, which binds us, governs the present case and precludes the plaintiff from succeeding. In both cases the plaintiff, though not a disqualified purchaser, himself derives title from a predecessor who was a disqualified purchaser. The fact that the plaintiff in *Littlechild* v. *Holt* (4) derived it by transmission on the intestacy of such a purchaser

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(1) [1947] K. B. 186
(2) [1947] K. B. 242.
(3) Ante, p. 6.
(4) Ante, p. 1.

C. A.
1949

LUCAS
v.
LINEHAM.

and in the present case by having taken a reversionary lease from such a purchaser can make no difference. If Mrs. Littlechild was affected by the clog (as Lord Goddard C.J., calls it), so also was the landlord here.

The argument for the plaintiff assumed that the decision in *Littlechild* v. *Holt* (1) rested essentially on the operation of s. 12 (1) (*f*). We have seen reason to doubt whether this is so; but we will consider the argument which the plaintiff builds on that assumption. Section 12 (1) (*f*) reads: "The "expressions 'landlord,' 'tenant,' 'mortgagee,' and 'mort-"'gagor' include any person from time to time deriving "title under the original landlord, tenant, mortgagee or "mortgagor."

The plaintiff relies on the word "original" before the word "landlord." The person deriving title is to be identified, he argues, with the original landlord in the sense of the person who first let to the tenant. Suppose that X. was the first lessor to the tenant, and Y. succeeded to X. by purchasing the freehold from X. over the head of the defendant sitting tenant, after the disqualifying date; and then suppose that the plaintiff landlord succeeded to Y. by will, or otherwise without "purchasing"; then, so the argument for the plaintiff runs, although Y. is a disqualified purchaser, it is not his status but that of X., the original lessor, which is material to the plaintiff landlord's rights under para. (*h*). The firm in this case on this argument were the "original "lessors," and they were not affected with any disability; hence neither is the plaintiff, and it matters not what was the position of the intermediate landlord, his wife.

It is quite clear, however, that Lord Goddard C.J. in *Littlechild* v. *Holt* (2) assumed that the words "original landlord" aptly described the intermediate landlord, the immediate predecessor in title of the plaintiff. He did not go back to, or consider in any way, the position of the person who in the first instance let to the first statutory tenant there. He speaks (2) of the "original landlord, Littlechild," but Littlechild was certainly not the "original landlord" in the sense in which Mr. Perrett, for the plaintiff, invited us to construe that term. The same applies to the judgment of Denning L.J. But we would repeat that in any case it seems more than

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(1) Ante, p. 1.

(2) Ante, pp. 1, 7.

C. A.
1949
Lucas
v.
Lineham.

doubtful whether any argument founded on s. 12 (1) (*f*) was necessary to the decision in that case. Any such argument indeed involves a somewhat radical re-writing of the terms of para. (*h*). The paragraph would have to be re-written as though, after the words "required by the landlord, not being "a landlord who has become" there followed the words "or whose original landlord became" "landlord by purchasing"—a complicated result and one which would be easier to reach if s. 12 (1) (*f*) had read "the expression 'landlord' includes a predecessor in title of the existing landlord" than on its existing wording, namely, "the expression 'landlord' includes any person from time to time deriving title "under the original landlord." However, these difficulties do not arise if we are right in concluding (1.) that s. 12 (1)(*f*) was not necessary to the decision in *Littlechild* v. *Holt* (1), or (2.) that, if it was, it is a decision that the phrase "original "landlord" is or includes the intermediate landlord, the immediate predecessor in title of the plaintiff landlord. For these reasons we think that the appeal should be allowed.

Appeal allowed.

Solicitors: *Kinch and Richardson, for Copley, Singleton and Billson, Croydon; Lloyd and Davey.*

A. W. G.

(1) Ante, p. 1.

IRVIN *v.* HINE.

1949
Oct. 19, 20, 21, 24, 25, 26, 27, 28, 31;
Nov. 29.
Devlin J.

Insurance (marine)—Constructive total loss—Ship damaged—Unlikelihood of obtaining licence to repair—Marine Insurance Act, 1906, *s.* 60*—Whether common law superseded—Partial loss—Valued policy—Measure of indemnity—Depreciation—Computation—Marine Insurance Act,* 1906 (6 *Edw.* 7, *c.* 41), *s.* 60; *s.* 69, *sub-s.* 3.

Section 60 of the Marine Insurance Act, 1906, provides that there is a constructive total loss of the subject-matter insured in certain given circumstances.

A ship stranded in January, 1942. The assured claimed under a policy of marine insurance that she was a constructive total loss because it was unlikely that he would be able to repair her within a reasonable time owing to war-time conditions and to the licensing system then in force.

Held, that, whether or not the loss would have been a constructive total loss on that ground at common law, it was not such a constructive total loss within s. 60; that that section was a definition section and circumscribed completely the conception of constructive total loss; and that that claim therefore failed.

Dictum of Lord Porter in *Robertson* v. *Petros M. Nomikos Ld.* [1939] A. C. 371, 392, applied.

The plaintiff claimed alternatively for a partial loss. The ship had not been repaired, and he was entitled under s. 69, sub-s. 3, of the Act "to be indemnified for the reasonable depreciation "arising from the unrepaired damage, but not exceeding the "reasonable cost of repairing such damage." That cost would have been 4,620*l*. The value of the ship was agreed by the policy at 9,000*l*. Her actual value was 3,000*l*. before the stranding and 685*l*. after the stranding. Section 27, sub-s. 3, of the Act provides that "subject to the provisions of the Act," the value fixed by the policy is conclusive, whether the loss be total or partial.

Held, that, by reason of s. 27, sub-s. 3, in computing her depreciation it was not correct to subtract her true value after the stranding from her true value before the stranding (3,000*l*.—685*l*.); that either (i) the true damaged value must be subtracted from the conventional value (9,000*l*.—685*l*.) or (ii) the proportion of her actual depreciation must be applied to her conventional value $\left(\frac{3{,}000-685}{3{,}000}\times 9{,}000l.\right)$; but that, as, in either case, the result exceeded 4,620*l*., the cost of repairs, the assured was only entitled to recover that sum.

Quaere, whether method (i) or method (ii) of computing depreciation under a valued policy under s. 69, sub-s. 3, is the correct one.

ACTION.

The following statement of facts is taken from the judgment of Devlin J.:—

The plaintiff sued the defendant as one of the underwriters to a Lloyd's policy of marine insurance on a steam trawler the *Elswick*. He sued as the executor of his wife who owned the trawler and who had taken out the policy. The plaintiff managed the ship and everything to do with her insurance on behalf of his wife and is hereinafter referred to as the assured.

The *Elswick* was a steam trawler built in 1906, 120 feet long with a beam of 21½ feet. In November, 1936, she was laid up in the Tyne because they were then bad times for the fishing industry. When the war came it brought with it a demand for small ships, and the assured was anxious to have the *Elswick* fitted out again. But after she had been laid up for so long she needed substantial refitting, and it was arranged that she should be towed to Peterhead for repairs.

1949

Irvin
v.
Hine.

While laid up the vessel had been insured for 2,000*l*. On December 11, 1941, the assured took out an all-risks policy on the vessel for the voyage to Peterhead in which she was valued at 8,000*l*., a figure which on January 16, 1942, was increased to 9,000*l*. The policy incorporated Institute Voyage Clauses, Hulls, including the clause: " In ascertaining whether " the vessel is a constructive total loss the insured value shall " be taken as the repaired value, and nothing in respect of " the damaged or break-up value of the vessel or wreck shall " be taken into account." On January 10 the voyage began. On the 20th the tow rope broke just outside the entrance to Peterhead Harbour and the vessel grounded on the Horseback Rock, where she was held by the stern with about 30 feet of her length unsupported. This happened in a very severe and prolonged storm. The peak of the storm was not reached until January 25, and it did not abate until the 28th, during which time the vessel received very heavy pounding. The assured was in Aberdeen when he heard the news. After a telephone conversation on the 22nd with one Livingstone, the repairer at Peterhead whom he proposed to employ, he made up his mind without himself seeing the vessel that she could not be taken off in whole. On February 4 he decided to abandon the ship to underwriters, and notice of abandonment was given on the 9th. It was not accepted. Meanwhile, on January 23, underwriters had instructed a surveyor to inspect the vessel. He inspected her so far as he could in her position on the rock on February 4, 5 and 6, and came to the conclusion that the visible damage was serious. The Admiralty Salvage Department was the only concern which in wartime conditions could undertake the salvage, and, owing to its other occupations, a considerable time elapsed before it could do so. On June 12, 1942, the vessel was floated off with the aid of pumps and beached just inside Peterhead Harbour on Spending Beach.

Thereafter there was deadlock between the assured and the underwriters. The underwriters required that the assured should put the vessel in dry dock so that she could be surveyed and the damage to her ascertained; the assured stood on his notice of abandonment and refused to interest himself at all in the vessel. She therefore lay where she was on Spending Beach. On November 25, 1942, she was examined by an

1949

IRVIN
v.
HINE.

officer of the Ministry of Transport in Aberdeen, to ascertain whether as a national asset she was worth repairing. She was not quite dry, so that he could not see the extent of the bottom damage, but he satisfied himself that the damage was considerable and that extensive repairs, some of which were due to her depreciated condition when she left the Tyne, would be necessary. He concluded that her repair was "not "an economical proposition," as she was not worth the labour and facilities which would have to be devoted to her. On January 8, 1943, she was again inspected by surveyors on behalf of the underwriters. She was never examined by anyone on behalf of the assured.

On July 10, 1943, the Admiralty began a salvage action in the Court of Session, and the assured was cited as defender. The salvors pleaded the value of the *Elswick* as not less than 1,500*l.* and sought an award of 500*l.* The assured took no part in the proceedings. They went uncontested, and in January, 1944, the ship was sold by auction by order of the court. She realized 685*l.* and on November 28, 1944, an award of 500*l.*, as asked, was made in favour of the Admiralty. The buyers asked the Ministry of Transport for a licence to repair and were refused. She remained on Spending Beach until the harbour authorities required her to be moved, when she was taken to a beach three miles south of Peterhead, where parts of her remained at the time of the action. On May 9, 1947, the plaintiff issued a writ against the defendant underwriter claiming that the vessel was a constructive total loss, or, alternatively, had sustained particular average damage amounting to not less than 9,000*l.*

Sir William McNair K.C. and *Mocatta* for the assured. The ship was a constructive total loss when notice of abandonment was given on February 9, 1942. She was reasonably abandoned on that date on the ground that her actual total loss appeared to be unavoidable: Marine Insurance Act, 1906 (1), s. 60, sub-s. 1.

(1) Marine Insurance Act, 1906, s. 16: "Subject to any express "provision or valuation in the "policy, the insurable value of "the subject-matter insured must "be ascertained as follows:— "(1.) In insurance on ship, the "insurable value is the value, "at the commencement of the "risk, of the ship . . . ."

Section 27, sub-s. 3: "Subject "to the provisions of this Act, "and in the absence of fraud, "the value fixed by the policy "is, as between the insurer and "assured, conclusive of the

She was then so much damaged by perils insured against that she could not, by reason of the licensing system then in force, be repaired at any cost within any foreseeable future time, or within any reasonable time.

There was a balance of probability that she could not be

" insurable value of the subject " intended to be insured, whether " the loss be total or partial."

Section 56, sub-s. 1: " A loss " may be either total or partial. " Any loss other than a total loss, " as hereinafter defined, is a " partial loss." Sub-section 2: " A total loss may be either an " actual total loss, or a constructive total loss."

Section 60: " *Constructive " total loss defined.*" Sub-section 1: " Subject to any express provision " in the policy, there is a constructive total loss where the " subject-matter insured is reasonably abandoned on account of " its actual total loss appearing to " be unavoidable, or because it " could not be preserved from " actual total loss without an " expenditure which would exceed its value when the expenditure had been incurred."

Sub-section 2: " In particular, " there is a constructive total loss " (i) Where the assured is deprived of the possession of " his ship or goods by a peril " insured against, and (*a*) it " is unlikely that he can recover the ship or goods, as " the case may be, or (*b*) the " cost of recovering the ship or " goods, as the case may be, " would exceed their value when " recovered; or (ii) In the case " of damage to a ship, where " she is so damaged by a peril " insured against that the cost " of repairing the damage would " exceed the value of the ship " when repaired . . . ."

Section 65, sub-s. 1: " Subject " to any express provision in " the policy, salvage charges " incurred in preventing a loss " by perils insured against may " be recovered as a loss by those " perils."

Section 69: " Where a ship " is damaged, but is not totally " lost, the measure of indemnity, " subject to any express provision " in the policy, is as follows: " (1) Where the ship has been " repaired, the assured is entitled " to the reasonable cost of the " repairs, less the customary " deductions, but not exceeding " the sum insured in respect of " any one casualty . . . . " (3) Where the ship has not " been repaired, and has not " been sold in her damaged state " during the risk, the assured is " entitled to be indemnified for " the reasonable depreciation " arising from the unrepaired " damage, but not exceeding the " reasonable cost of repairing " such damage, computed as " above."

Section 71: " Where there is " a partial loss of goods . . . . " the measure of indemnity, subject to any express provision " in the policy, is as follows: " . . . . (3) Where the whole or " any part of the goods . . . . " insured has been delivered " damaged at its destination, " the measure of indemnity is " such proportion of the sum " fixed by the policy in the case " of a valued policy, or of the " insurable value in the case of " an unvalued policy, as the

1949

IRVIN v. HINE.

recovered, as a usable ship, within a reasonable time: Marine Insurance Act, 1906, s. 60, sub-s. 2 (i) (*a*); *Pollurian Steamship Co. Ld.* v. *Young* (1), applied in *Roura and Forgas* v. *Townend* (2). There is a constructive total loss if the assured can say, in the circumstances, (i) that the ship is so damaged as to be unusable as a ship, and (ii) that the balance of probability is that she cannot be repaired, and made serviceable, in the foreseeable future.

In the present case the control of repairs was vested in a government department, and it was illegal to repair the ship. The ship was therefore a constructive total loss within the meaning of the authorities before the Act of 1906 because there were no facilities for repairing her. *Somes* v. *Sugrue* (3) shows that the circumstances of place were material as well as the physical condition of the ship. A ship was a constructive total loss at common law if she foundered in foreign parts and the master was unable to raise money for repairs: see per Tindal C.J. in *Somes* v. *Sugrue* (4); *Read* v. *Bonham* (5). A fortiori she must be a constructive total loss if the owner is unable to obtain a licence for repairs.

Alternatively, the ship was a constructive total loss because she was so much damaged that the cost of repairing the damage would exceed her value when repaired: s. 60, sub-s. 2 (ii), of the Act of 1906.

The plaintiff claims, alternatively, for a partial loss.

Sir Robert Aske K.C. and *A. J. Hodgson* for the underwriters. The assured was in breach of duty under s. 78, sub-s. 4 of the Act. He ought to have had the ship surveyed in order to

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"difference between the gross "sound and damaged values "at the place of arrival bears "to the gross sound value."

Section 75, sub-s. 1: "Where "there has been a loss in respect "of any subject-matter not "expressly provided for in the "foregoing provisions of this Act, "the measure of indemnity shall "be ascertained, as nearly as "may be, in accordance with "those provisions, in so far as "applicable to the particular "case."

Section 78, sub-s. 4: "It is "the duty of the assured and his "agents, in all cases, to take "such measures as may be "reasonable for the purpose of "averting or minimising a loss."

Section 91, sub-s. 2: "The "rules of the common law "including the law merchant, "save in so far as they are "inconsistent with the express "provisions of this Act, shall "continue to apply to contracts "of marine insurance."

(1) [1915] 1 K. B. 922, 937.

(2) [1919] 1 K. B. 189, 194.

(3) (1830) 4 Car. & P. 276.

(4) Ibid. 283.

(5) (1821) 3 Brod. & B. 147.

minimize the loss falling on the underwriters. That was so whether the ship was a constructive total loss or not, because, if she was a constructive total loss, the underwriters were entitled to salvage. The assured's failure prevented the underwriters from producing proper evidence as to the loss. The court should not entertain a claim which cannot be proved. The assured's failure to have the ship surveyed prevented proof of his claim.

The ship was not a constructive total loss. It is not correct to say that the assured could not have obtained a licence to repair the ship within a reasonable time. What was a reasonable time must be judged in the light of what would be so contemplated by the parties when the insurance was taken out. The assured must then have contemplated a long wait for a licence if the ship were damaged.

But the question whether the assured was able to get a licence to repair is not relevant. The old authorities cited for the assured are not material to the question in the present case. The observation relied on of Tindal C.J. in *Somes* v. *Sugrue* (1) was obiter. In *Read* v. *Bonham* (2) the evidence of the captain was that it would have been an act of madness to repair the ship in the shattered state in which she was. In any case those decisions for present purposes are otiose: the present question must be considered under the Marine Insurance Act, 1906, and under that Act alone. That point was determined by Lord Porter in *Robertson* v. *Petros M. Nomikos, Ld.* (3). He said that s. 60 was intended to be a complete and not a partial definition of constructive total loss. Pickford J. said in *Pollurian Steamship Co. Ld.* v. *Young* (4): "I have now to deal with the definitions contained in the Marine Insurance Act, 1906, whatever may have been the definitions before." Section 60 is the one source to which one must look in order to ascertain whether a ship is or is not a constructive total loss. The assured cannot rely on that section.

The words "reasonably abandoned" in s. 60, sub-s. 1, refer to physical abandonment, not abandonment to underwriters: *Court Line* v. *The King* (5). The ship must be "reasonably abandoned on account of its actual total loss

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(1) 4 Car. & P. 276, 283.

(2) 3 Brod. & B. 147.

(3) [1939] A. C. 371, 392.

(4) (1913) 19 Com. Cas. 143, 152.

(5) [1945] W. N. 147; 61 T. L. R. 418.

"appearing to be unavoidable." But in the present case the ship was in fact salved.

Section 60, sub-s. 2 (i) (*a*) refers only to cases in which the ship is taken out of the possession of the assured: per du Parcq L.J. in *Court Line* v. *The King* (1), Arnould on Marine Insurance, s. 1107. In the present case the ship was never out of the assured's possession. There must be actual deprivation of possession: per Porter J. in *Carras* v. *London and Scottish Assurance Corporation, Ld.* (2).

As regards the alternative claim for a partial loss, s. 69, sub-s. 3 does not, strictly speaking, apply to the present case. The ship never arrived at her destination, Peterhead. The risk never, therefore, ran off, and the sale under the order of the court in 1944 was a sale during the risk. That being so, s. 75, sub-s. 1, or s. 91, sub-s. 2, must be applied.

[DEVLIN J. It is artificial to say that the risk was still running when the ship was sold. If the assured abandoned the voyage by his conduct would not the risk terminate?]

Yes.

[DEVLIN J. I do not think that the ship was sold, in the present case, during the risk.]

By s. 69, sub-s. 3, the assured is entitled only to "the "reasonable depreciation arising from the unrepaired damage." That means the difference between her actual values before and after the loss. It would be extraordinary if one took her actual value after the loss and her conventional value before it. Quite different language is used in s. 71, sub-s. 3, which provides the measure of indemnity in the case of damage to goods. There would be no point in using such different language, if it were intended by s. 69, that sub-s. 3, the conventional value of the ship was to be taken into account.

[DEVLIN J. referred to s. 27, sub-s. 3.]

If the conventional figure must be taken into account, the proportion of depreciation should first be ascertained by reference to the true values, and that proportion should then be applied to the conventioned value: see per Lindley J. in *Pitman* v. *Universal Marine Insurance Co.* (3); *Elcock* v. *Thomson* (4).

In any event the assured is not entitled, by s. 69, sub-s. 3, to more than the reasonable cost of repairs. The date for

(1) 61 T. L. R. 418, 423.

(2) (1935) 40 Com. Cas. 288, 294.

(3) (1882) 9 Q. B. D. 192, 201.

(4) [1949] 2 K. B. 755.

estimating that cost is 1942, when the ship was damaged, not 1947 when she might have been repaired. By s. 69, sub-s. 3, that cost must be "computed as above," namely, in accordance with sub-s. 1, which provides for the computation of the cost of actual repairs. The assured cannot increase his damages by delaying action. Had he sued in 1942 he would have been bound by current prices unless he could have proved that he could not get repairs effected then and that it was highly probable that prices would rise: *S.S. Celia* v. *S.S. Volturno* (1).

Sir William McNair K.C. in reply. As regards the last point, Lord Sumner said expressly in *S.S. Celia* v. *S.S. Volturno* (2) that the cost of repairs (before conversion into sterling) should be taken "as at the date when liability for the several "outlays accrued."

[Devlin J. I am not convinced by Sir Robert Aske on that point.]

The central point of the case is whether there was a constructive total loss of the ship. The state of facts in the present case establishes a constructive total loss at common law. It is clear that if a ship at a foreign port is so damaged by the perils insured against that she requires substantial repair, and the master, through lack of repair facilities or lack of money, is unable to repair and sells the ship, there is at common law a constructive total loss, not as the result of the sale, but as the result of perils of the sea. It is argued for the underwriters that, whatever the old law may have been, the provisions of the Marine Insurance Act render the old cases of no importance; but it is submitted that that is not so. There is a close connexion between the doctrine of frustration and that of constructive total loss: see Sir Arnold McNair, Legal Effects of War (2nd ed.), p. 139; per Maule J. in *Moss* v. *Smith* (3); *Carras* v. *London and Scottish Assurance Corporation* (4); *Kulukundis* v. *Norwich Union Fire Insurance Society* (5). By the doctrine of frustration, if there is a change of circumstances which involves delay, the law says that a man cannot be held indefinitely to a business contract. He is not bound to wait and see what the future may bring forth, but is entitled to say, when faced with a commercial disaster, that he is free of any obligation: see per Scrutton L.J.

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(1) [1921] 2 A. C. 544.
(2) Ibid. 554.
(3) (1850) 9 C. B. 94, 103.
(4) [1936] 1 K. B. 291.
(5) [1937] 1 K. B. 1.

1949

IRVIN
v.
HINE.

in *Embiricos* v. *Sydney Reid & Co.* (1), where he said : "Commercial men must not be asked to wait till the end of a long "delay to find out from what in fact happens whether they "are bound by a contract or not ; they must be entitled to "act on reasonable commercial probabilities at the time when "they are called upon to make up their minds." See also Arnould, Marine Insurance, s. 165. If the ship in the present case was completely immobilized at the time of the notice of abandonment and she could not be repaired then and no one could give the slightest hope of a time when she could be repaired, the point had arrived at which, the law says, the assured is entitled to disentangle himself and put the burden on the underwriters. In *Rickards* v. *Forestal Land, Timber and Railways Co.* (2), Lord Wright said : "A constructive "total loss is a device intended to subserve the purpose of "indemnity by enabling the assured, when, by insured perils, "the postulated danger of loss or deprivation is caused, to "disentangle himself, subject to definite limits and conditions, "from the danger and throw the burden on the underwriters." It is necessary to supplement the Marine Insurance Act by reference to the common law : s. 91, sub-s. 2 ; *British & Foreign Marine Insurance Co. Ld.* v. *Samuel Sanday & Co.* (3), per Earl Loreburn L.C. and Lord Wrenbury.

Section 60 is clearly not comprehensive. It does not provide at all for constructive total loss of freight : see per Porter J. in *Kulukundis* v. *Norwich Union Fire Insurance Society* (4).

[DEVLIN J. But must one not pay attention to s. 60 in determining whether there is a constructive total loss of freight ?]

Only to see if one can get any help from it. No reliance has been placed on it in any of the cases for the reason given by Porter J. in *Kulukundis* v. *Norwich Union Fire Insurance Society* (4), namely, that freight insurance is so difficult that the Act makes little reference to it. Section 60 does not cover the case where freight is lost by delay. Moreover, freight is not capable of physical abandonment. Again s. 60 does not cover cases of insurance of goods in which the adventure is lost : *British and Foreign Marine Insurance Co. Ld.* v. *Sanday* (5). *Pollurian Steamship Co. Ld.* v. *Young* (6) shows that

(1) [1914] 3 K. B. 45, 54.

(2) [1942] A. C. 50, 84.

(3) [1916] 1 A. C. 650, 657, 673.

(4) (1935) 41 Com. Cas. 239, 250.

(5) [1916] 1 A. C. 650, 657, 658, 673.

(6) [1915] 1 K. B. 922.

s. 60 is incomplete. In that case the Court of Appeal affirmed the judgment below of Pickford J. in which he read into sub-s. 2 (i) (*a*) of the section the words "within a reasonable "time" (1). Section 60 defines only the main characteristics of constructive total loss and is not exhaustive: see per Lord Wright in *Rickards* v. *Forestal Land, Timber and Railways Co.* (2); and in *Carras* v. *London and Scottish Assurance Corporation* (3). As regards Lord Porter's dictum in *Robertson* v. *Petros M. Nomikos, Ld.* (4), the point in that case was not in any way whether s. 60 contained a complete code. The dictum was obiter, and it was not expressed as a final opinion on the law. There is no repugnancy between the head of constructive total loss which it is sought to establish here and s. 60: see per Viscount Birkenhead L.C. in *Palgrave, Brown & Son, Ld.* v. *S.S. Turid* (5). The common law should therefore be applied by s. 91, sub-s. 2.

Alternatively the loss falls within s. 60, sub-s. 1, because an actual total loss appeared to be unavoidable. That, it is submitted, should be found as a conclusion of fact.

[DEVLIN J. Do you mean that it appeared unavoidable that she should remain indefinitely on the rock?]

She had to stay on the rock, or on the beach, unless a licence for repairs could be obtained.

Alternatively the loss falls within s. 60, sub-s. (2) (ii). At the time of the notice of abandonment the vessel was not, in the opinion of practical men, worth repairing.

As regards the alternative claim for a partial loss it may be conceded that the risk had run off when the ship was sold and that the measure of indemnity is therefore governed by s. 69, sub-s. 3. Subject to proof by the underwriters of the reasonable cost of repairs, the assured is entitled by that subsection to the reasonable depreciation in value of the ship. Where the policy is unvalued that depreciation must clearly be assessed by subtracting the damaged value from the undamaged value. Where the policy, as in the present case, is valued the depreciation must be assessed by subtracting from the conventional undamaged value the true damaged value. By s. 27, sub-s. 3, the "value fixed by the policy "is . . . . conclusive of the insurable value . . . . whether "the loss be total or partial." By s. 16, sub-s. 1, the "insurable

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(1) 19 Com. Cas. 143, 155.
(2) [1942] A. C. 50, 83.
(3) [1936] 1 K. B. 291, 305.
(4) [1939] A. C. 371, 392.
(5) [1922] 1 A. C. 397, 406.

"value is the value, at the commencement of the risk, of the "ship." If that sub-section be read into s. 27, sub-s. 3, the latter sub-section reads: "The value fixed by the policy is "conclusive of the value, at the commencement of the risk, "of the ship, whether the loss be total or partial." In *Elcock* v. *Thomson* (1) Morris J. said: "Indemnification for reasonable depreciation must in my judgment take into account "any agreed valuation. Such agreed valuation is the corpus "out of which depreciation takes place and by reference to "which the depreciation must be measured." But he failed to apply that principle in that case. In the case of goods quite a different principle applies, by s. 71, sub-s. 3, because underwriters are not concerned with the rise and fall in the market value of the goods at the port of destination. The assured is therefore entitled only to such proportion of the conventional value "as the difference between the gross sound and damaged "values at the place of arrival bears to the gross sound value," in order that market fluctuations may be eliminated from the calculation. No such considerations arise in the case of a ship: see Arnould, Marine Insurance, ss. 1011-1013.

It is conceded that the assured is not entitled to more than the reasonable cost of repairs; but the onus of proving that figure is on the underwriters: see per Lindley J. in *Pitman* v. *Universal Marine Insurance Co.* (2).

Cur. adv. vult.

Nov. 29. DEVLIN J. read the following judgment: As the plaintiff managed the ship on behalf of the assured, his wife, it is convenient, if not strictly accurate, to refer to him as the assured. He made up his mind, without himself seeing the vessel, that she could not be taken off Horseback Rock whole, that is to say, as a ship, and gave notice of abandonment to the underwriters on February 9, 1942. In reaching that conclusion he took, I think, too gloomy a view; he was perhaps influenced by the fact that he had previously lost a trawler on that rock in 1928. [His Lordship stated the facts as above set out, and continued:] The main ground on which the claim for constructive total loss was presented was that it was at all material times unlikely that the assured would be able to obtain a licence to repair her or place her in dry dock within a reasonable time. In considering this plea I have first to determine whether it is made out on the facts;

(1) [1949] 2 K. B. 755, 762. (2) 9 Q. B. D. 192, 202.

and, if it is, whether it is sound in law. Counsel for the assured conceded that it could not be brought under any of the heads in s. 60 of the Marine Insurance Act, 1906, in which a constructive total loss is apparently defined, and that it would require the addition to sub-s. 2 of an additional particular case. He contended, however, that it could be justified at common law, and that the common-law principle was not inconsistent with any of the provisions of s. 60; accordingly, by virtue of s. 91, sub-s. 2, which provides that the rules of the common law, save in so far as they are inconsistent with the express provisions of the Act, shall continue to apply, he claimed that he was entitled to succeed.

[His Lordship then considered the evidence on this issue and continued:] There was a great scarcity of dry docks at the time of the casualty, a scarcity which was bound to continue for the rest of the war. I think that the proper inference from the evidence is that there would in all probability be an indefinite delay in the granting of a licence. It was uncertain when a licence would be granted and unlikely that it would be granted within a reasonable time. Counsel for the underwriters submitted that the reasonable time must be judged in the light of what would be in the mind of the parties at the time when the policy was taken out, and that the assured must have contemplated a long wait for a licence if his ship were damaged. I do not think that that is the right test. It is certainly not the test applied in the case of deprivation of possession, for example, by capture. I think that the reasonable time is to be judged prospectively from the time of the casualty; and that the prospect of indefinite delay negatives the likelihood of return within a reasonable time. On this issue of fact I am in the assured's favour.

I have heard an interesting argument on the common-law principle governing constructive total loss, but it would be idle for me to express any opinion on it unless I first determine that I can look outside the Act. What I have to consider is whether the Act, on its true construction, expressly provides that s. 60 is a complete definition. If it does, then any addition to the definition or alteration of it would be inconsistent with its completeness, and so would not be admissible under s. 91, sub-s. 2. Section 56, sub-s. 1, provides: "Any loss other "than a total loss, as hereinafter defined, is a partial loss." That seems, as Lord Porter pointed out in *Robertson* v. *Petros M. Nomikos Ld.* (1), to mean that the definition of constructive

(1) [1939] A. C. 371, 392.

total loss in s. 60 must be complete. If any loss outside s. 57 (which defines actual total loss) and s. 60 were to be held to be a total loss, it could not be a partial loss, which would be inconsistent with the express provision of s. 56. I see no answer to this argument except possibly that it puts too literal a construction on the words of s. 56. That makes it material to consider whether such a construction is out of harmony with the object of s. 60, as shown in its marginal note, and with the general purpose of the Act. The marginal note is, "Constructive total loss defined." This is in keeping with the words of s. 56 "total loss as hereinafter defined" and shows that s. 60 is intended to contain a definition. I have used the words "complete definition" as Lord Porter did, as a convenient and expressive term. I dare say it is not meticulously accurate; for, strictly speaking, a definition must be complete, else it is not a definition at all. The question really is whether s. 60 is a definition section, defining constructive total loss as a whole, and not merely categories of it; or whether, as counsel for the assured in terms argued, all that it does is to lay down the main characteristics of a constructive total loss. This argument gives no weight to the word "defined" both in s. 56 and in the marginal note to s. 60. I think that that word shows conclusively that s. 60 is intended to define a constructive total loss, which is the same as saying that s. 60 circumscribes completely the conception of constructive total loss. As to the general purpose of the Act, it is described in its title as a codifying Act, and it would, I think, be surprising if its framers had not included in it a comprehensive definition of constructive total loss; or that, if they had intended only to define categories, they would not have made their intention clear.

I have arrived at my conclusion without relying on the authority of the dictum by Lord Porter to that effect in *Robertson* v. *Petros M. Nomikos Ld.* (1). I have approached the matter in this way because counsel for the plaintiff may be right in saying that it was obiter dictum. But the conclusion which I have reached is greatly strengthened by the high persuasive authority of such a dictum. This appears to be the only place in the authorities in which the point has been considered. Counsel for the assured claimed that Pickford J. in *Pollurian Steamship Co. Ld.* v. *Young* (2) had in effect treated s. 60 as incomplete by adding the qualifica-

(1) [1939] A. C. 371, 392.

(2) 19 Com. Cas. 143, 155.

tion "within a reasonable time" to the provision about recovery of the ship or goods in sub-s. 2 (i). It seems to be clear from the passage referred to that Pickford J. was doing no more than to give the provision what he thought was its right construction. The sub-section is silent as to whether the deprivation of possession has to be perpetual or not, and so is open to either construction. Even if the right construction of the language, taken by itself, is that the deprivation of possession is to be perpetual, it is clear that the Act does not textually cover the point, and accordingly there would be a lacuna which the common law could fill without inconsistency with any express provision. I hold, therefore, that the plea that the trawler was a constructive total loss because it was unlikely that the assured would be able to obtain a licence to repair her is bad in law.

A constructive total loss is further claimed in two alternative ways, the first of them being that the trawler was abandoned on the ground of her actual total loss appearing unavoidable. As I have said, the view taken at the time by the assured was that she could not be got off the Horseback Rock. This turned out to be wrong; and I do not think that it was seriously contended that it was ever justified. I decide against it on the facts. Counsel for the assured did, however, seek to uphold the plea under s. 60, sub-s. 1, by means of a variant of his main contention. If the delay in repairing was such that the most likely fate for the ship was that she would be left to rot so that her actual total loss would appear to be unavoidable, a claim might be maintained under s. 60, sub-s. 1; see, for example, per Park J. in *Read* v. *Bonham* (1). In my judgment the facts of the present case do not sustain this contention. The merits of it were not much explored in the evidence, and the only material I have is that, as she lay on the Spending beach, she was in a fairly sheltered position and that she did not deteriorate, at any rate, between June and November, 1942. It is one thing to say that her repairs would probably be deferred for an indefinite period, and another thing to say that she would probably not be repaired before she rotted. I do not think that there is sufficient evidence to justify the latter conclusion.

The second alternative claim for a constructive total loss is made under s. 60, sub-s. 2 (ii), of the Act. It was alleged that the cost of repairing the damage would have exceeded

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(1) 3 Brod. & B. 147, 155.

1949

Irvin v. Hine.

Devlin J.

the vessel's insured value of 9,000*l*. This figure is taken because the policy contains the usual clause providing that the insured value shall be taken as the repaired value. Counsel for the assured said that it was sufficient for him to establish that at the time of the notice of abandonment the vessel was not in the opinion of practical men worth repairing.

I accept that it is open to an assured in a proper case to rely on the opinion of practical men that a ship is not worth repairing, and that he is not obliged to cause a detailed examination to be made of her, and a detailed estimate prepared. Her irreparability might be so obvious that a survey would be a waste of time and money. A ship might be, though it is now less likely than in former times, so damaged as to be unfit to take to sea at a place where repairs or even a survey was impossible: *Somes* v. *Sugrue* (1) is an example of such a case. A more modern example is to be found in *G. Cohen, Sons, and Co. Ld.* v. *Standard Marine Insurance Co. Ld.* (2), see per Roche J. But if an assured wants to abandon a ship on this ground without relying on what Roche J. called "nice calculation of amounts," I think that he must satisfy the court that she was obviously not worth repairing. Tindal C.J. referred to this point in *Somes* v. *Sugrue* (3) in considering whether the sale of the vessel in that case was justified, and his observations are, I think, equally applicable to a case of abandonment without sale. He said: "It must not be a "mere measuring cast, not a matter of doubt in the mind, "whether the expense would or would not have exceeded the "value; but it must be so preponderating an excess of "expense, that no reasonable man could doubt as to the "propriety of selling under the circumstances instead "of repairing." See also per Porter J. in *Carras* v. *London and Scottish Assurance Corporation, Ld.* (4).

I do not doubt that by February 9, 1942, a practical man would rightly have thought that the *Elswick* was not worth repairing; but that is because I take the view that her real value was considerably below 9,000*l*. The question which I have to consider is whether it was obvious that the repairs due to the stranding would exceed 9,000*l*. The assured relied on the evidence of three witnesses, who were certainly all practical men. [His Lordship then considered their

(1) 4 C. & P. 276.

(2) (1925) 30 Com. Cas. 139, 151.

(3) 4 C. & P. 276, 283.

(4) 40 Com. Cas. 288, 300, 301.

evidence, and continued :] On the whole matter I come to the conclusion that no reasonable man could say in 1942, without an examination of the vessel, that the repair of the stranding damage would obviously cost more than 9,000*l*. If these three witnesses intended to say that, I reject their evidence on this point.

I turn now to consider the alternative claim for a partial loss. In the early stages of his argument on this point, counsel for the underwriters submitted that the case did not fall within any of the provisions of the Act. The only relevant provision is s. 69, sub-s. 3. Counsel submitted that as the ship had never arrived at her destination in Peterhead the period of risk was never terminated, with the result that the sale under the order of the court in 1944 was a sale during the risk. In the course of this argument I put forward as a possible view that the risk terminated when the ship was abandoned by the assured in circumstances and in language which made it clear that he did not intend to pursue the voyage to its destination. Neither side expressly accepted this view, but likewise neither actively dissented from it, and both sides addressed me on the assumption that the case fell within s. 69, sub-s. 3. I think that that assumption is correct : see Arnould, Marine Insurance, s. 504.

Although it is not the logical starting point under s. 69, sub-s. 3, I think that it is convenient in the circumstances of this case that I should begin by computing the reasonable cost of repairing the stranding damage. Before I come to the figures I must refer to some preliminary matters.

It is common ground that any accurate estimate of the extent of the damage could not be obtained without a survey of the ship in dry dock, which was never carried out. The underwriters contend that it was the assured's duty under s. 78, sub-s. 4, to cause such a survey to be made, and that as he was in breach of his duty the claim cannot be sustained. Section 78, sub-s. 4, requires the assured to take such measures as may be reasonable for the purpose of averting or minimizing a loss. A survey in dry dock in the circumstances of this case would not have averted or minimized the loss but merely ascertained its extent. Its cost would, I think, be part of the cost incurred by the assured in proving his claim. In so far as the burden of proof lies on the assured, it may be foolish of him to dispense with the survey ; but that is another matter. I do not think that he is in breach of any duty under s. 78, sub-s. 4. I think it doubtful whether, with the scarcity of dry-dock facilities, a survey would have been allowed merely for the purpose of quantifying a claim. But I regard the matter as of minor importance. It is true that, without the survey, the extent of the damage cannot be exactly ascertained and must be a matter of conjecture or of inference. Whether this state of affairs is the assured's misfortune or his fault, the burden of proof is, I think, the same. He has not to establish with certainty that any item of damage occurred: he has to satisfy me that on balance of probability it did.

The assured's figures for the cost of necessary repairs due to the stranding were taken as the cost of repairs in 1946, and I was invited by the underwriters to deduct the appropriate percentage so as to reduce them to a 1942 basis. I think that that contention is unsound. In estimating the cost of repair for the purpose of a partial loss, I think that the court has to arrive as near as possible at the actual figure which would have been expended had she been repaired; and if it be proved to my satisfaction, as it is, that she could not have been repaired earlier than the early part of 1947, I think that I ought to take the figures appropriate to that time.

[His Lordship then considered the evidence as to the correct figure for the cost of repairs, and continued:] Accordingly, I assess the cost of the repairs due to the stranding at 4,620*l.*

I must now return to s. 69, sub-s. 3, of the Act. By its provisions I have first to ascertain the reasonable depreciation arising from the unrepaired damage. That requires a comparison between the value of the vessel immediately before the damage, and the value in her damaged condition. The value in her damaged condition is taken by both sides to be 685*l.* There is a dispute about the ascertainment of her undamaged value, both on the law and on the facts. Counsel for the underwriters contended that the value to be ascertained for this purpose was her true value, which he put at 2,000*l.*, and not her conventional value of 9,000*l.* On this contention the assured's claim would be limited to 1,315*l.* Alternatively, he contended that the extent to which the ship had depreciated in value should be ascertained by a comparison between her true undamaged value and her true damaged value. This would show that she had depreciated in value by approximately two-thirds. This proportion should then be applied to her conventional value, thus arriving at a figure (subject, of course, to the overriding maximum of the cost of repairs) of about 6,000*l*. This method of ascertaining the extent of the depreciation where there is a valued policy is that which is specifically prescribed by s. 71, sub-s. 3, in the case of damaged goods.

I do not accept the first of these contentions. Section 27, sub-s. 4, provides that the value fixed by the policy is conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial. Consequently, I think that, unless the underwriters' alternative contention is right, the effect of s. 69, sub-s. 3, is that the true damaged value must be subtracted from the conventional undamaged value. This is indeed what was contended on behalf of the assured. It produces a figure of over 8,000*l*. It is unnecessary for me to decide whether this contention of the assured is to be preferred to the alternative contention of the underwriters. For both methods produce a figure higher than that which I have taken as the cost of repairs; and there is no doubt that the latter figure is overriding.

This makes it likewise unnecessary that I should for the purposes of this judgment find any figure for the true undamaged value of the ship. But, as it is a question of fact, I think it desirable that I should express, so far as I can, the view which I have formed about it. [His Lordship discussed the material before him and continued:] On this material I hardly feel that I could put a figure on the true undamaged value of the ship on which I should consider it safe to rely, if it were an integral part of my judgment. Subject to this, and for what it is worth, I put the figure at about 3,000*l*.

In addition to the claim for partial loss under s. 69, sub-s. 3, there is a claim for salvage charges recoverable under s. 65, sub-s. 1. Prima facie, this should be 500*l*., the amount awarded by the Court of Session, and this is the figure that the assured claims. But that award is not binding upon the underwriters. In any case in which the assured claims reimbursement of expenditure of this character, particular charges and salvage charges, he must satisfy the court that the amount expended was reasonable. The award of a court is, no doubt, prima facie evidence of what is reasonable; but, at any rate in a case where the judgment went by default, it is not in my view conclusive. The award of 500*l*. is one-third of 1,500*l*. which the Admiralty alleged to be her salved value. I think that the best evidence of her value is the figure of 685*l*. for which she was in fact sold. Indeed, I do not see how the

1949

IRVIN
v.
HINE.

Devlin J.

assured can invite the court to take the figure of 685*l.* as her value after the casualty for the purpose of s. 69, sub-s. 3, as he desires me to do, and at the same time contend that 1,500*l.* was the right value for salvage purposes. I take 685*l.* as her salved value. On this basis the award of 500*l.* is more than two-thirds of her value. I think that a proportion of two-thirds is excessive, and would not have been awarded by the Court of Session or any other tribunal, if the proceedings had been contested. It may be that on the lower value of 685*l.* a proportion of rather more than a third should be allowed. I think on the whole that a fair figure is 300*l.*

Accordingly the assured is entitled to recover 4,920*l.* under the policy, and I shall give judgment for the plaintiff for the appropriate proportion of the amount subscribed by the defendant underwriter of the 9,000*l.* insured.

Judgment accordingly.

Solicitors: *William A. Crump & Son*; *Hill, Dickinson & Co.*

R. P. C.

Applied. JONAS *v.* ROSENBERG
[1950] 2 K. B. 52

C. A.

1949
Dec. 16, 19, 20.

Evershed M.R.
Cohen and
Asquith L.JJ.

HUTCHINSON *v.* JAUNCEY.

Landlord and tenant—Rent restriction—Premises shared with landlord—Notice to quit—Summons for possession—Statute preserving tenant's position—Retrospective effect—" Anything done " before coming into force of Act—Meaning—Landlord and Tenant (Rent Control) Act, 1949 (12 & 13 *Geo.* 6, *c.* 40), *ss.* 9 *and* 10.

In October, 1945, the tenant of a house within the protection of the Rent Restriction Acts sub-let two rooms in it, sharing the use of the scullery for cooking with the sub-tenant. The sub-tenant subsequently bought the house subject to the tenancy, and in his capacity as landlord served a valid notice to quit on the tenant expiring on April 25, 1949, and, on the tenant's refusing to comply with it, on May 25 issued a plaint claiming possession. On that date as the law then stood the tenancy was not within the protection of the Rent Restriction Acts owing to the sharing of the use of the scullery. On June 2, 1949, the Landlord and Tenant (Rent Control) Act, 1949, came into force which by ss. 7, 8 and 9 extended the protection of the Rent Restriction Acts to the various cases where the tenant "shared" accommodation with others, and by s. 10 those three sections "shall "apply whether the letting in question began before or after "the commencement of this Act, but not so as to affect rent in "respect of any period before the commencement thereof or "anything done or omitted during any such period." The case was heard on July 22, 1949, when the county court judge, applying the rule enunciated in *Prout* v. *Hunter* [1924] 2 K. B. 736, *Leslie & Co. Ld.* v. *Cumming* [1926] 2 K. B. 417, and *Turner* v. *Baker* [1949] 1 K. B. 605, held that the law applicable was the law applicable at the date of the issue of the plaint, and made an order for possession. On appeal by the tenant,

Held, (1.) that those cases were distinguishable and had been misapplied by the county court judge, as they only established that in considering whether there was a letting within the Rent Restriction Acts the law must be applied to the state of facts existing at the date of the issue of the plaint and had no bearing on the question whether the law applicable was the law as it existed at the date of the issue of the plaint or as it existed at the date of the hearing. (2.) That, on the true construction of s. 10, the relevant provision of the Act applied to pending actions. Statement by Jessel M.R. in *In re Joseph Suche & Co. Ld.* (1875) 1 Ch. D. 48, 50, that enactments, unless in express terms they apply to pending actions, do not affect them, disapproved. (3.) That accordingly the law applicable was the law as it existed at the date of the hearing and as the tenancy was then protected by the provisions of the Rent Restriction Acts by virtue of the Act of 1949, there was no jurisdiction to make an order for possession.

Remon v. *City of London Real Property Co. Ld.* [1921] 1 K. B. 49, applied.

APPEAL from Edmonton county court.

The defendant, George Jauncey, was tenant of a dwelling-house within the protection of the Rent Restriction Acts at a weekly rent of 11*s.* 1*d.* In October, 1945, he sublet two rooms on the first floor to the plaintiff, Harry Hutchinson, together with the use of the scullery in common with himself. The tenant retained for his own use two rooms on the ground floor. On March 21, 1949, the plaintiff purchased the premises subject to the tenancy. On April 11, 1949, a valid notice to quit, expiring on April 26, 1949, was given by the plaintiff as landlord to the tenant. On May 25, 1949, the landlord issued a plaint claiming possession. On June 2, 1949, the Landlord and Tenant (Rent Control) Act, 1949, came into force. The case was heard on July 22, 1949, and at the hearing it was conceded that, apart from the Act of 1949, because the scullery was used in common for cooking purposes, the premises would have been outside the protection of the Rent Restriction Acts; but the tenant contended that he was retrospectively protected by that Act. The county court judge made an order for possession, holding that, as the Act of 1949 was not in operation when the plaint was issued, the tenant was not protected by it.

The tenant appealed.

J. Sofer for the tenant. Section 9 of the Landlord and Tenant (Rent Control) Act, 1949 (1) operates retrospectively to give protection to the tenant. Ordinarily, if a tenant has been given notice to quit which has expired and remains in possession against the wishes of his landlord he becomes a trespasser. If, however, such a tenant is still in possession when a new statute comes into operation bringing his original tenancy within the scope of the Rent Restriction Acts, the tenant will be protected: *Remon* v. *City of London Real Property Co. Ld.* (2). It was held in *Prout* v. *Hunter* (3), *Leslie & Co. Ld.* v. *Cumming* (4) and *Turner* v. *Baker* (5) that the relevant date to discover whether on the facts a dwelling was within the Rent Restriction Acts was the date of the issue of the writ. These decisions do not lay down the principle that the law also must be ascertained at the date of the issue of the writ. The facts must be taken as they stand at the date when the writ is issued, but the law as it is at the date of the hearing. Secondly, in s. 10 of the Act of 1949 the provision that the three foregoing sections are not to affect "anything done" before the coming into force of the Act refers to ejectment. The issue of a plaint is not equivalent to re-entry until an order has been made.

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(1) The Landlord and Tenant (Rent Control) Act, 1949, s. 9: "Where the tenant of any premises, being a house or part of a house, has sublet a part, but not the whole, of the premises, then as against his landlord or any superior landlord (but without prejudice to the rights against and liabilities to each other of the tenant and any person claiming under him, or of any two such persons) no part of the premises shall be treated as not being a dwelling-house to which the principal Acts apply by reason only—(*a*) that the terms on which any person claiming under the tenant holds any part of the premises include the use of accommodation in common with other persons, or (*b*) that part of the premises is let to any such person at such a rent as is mentioned in proviso (i) to sub-s. 2 of s. 12 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (which relates to furnished lettings)."

Section 10: "The three last foregoing sections shall apply whether the letting in question began before or after the commencement of this Act, but not so as to affect rent in respect of any period before the commencement thereof or anything done or omitted during any such period."

(2) [1921] 1 K. B. 49.

(3) [1924] 2 K. B. 736.

(4) [1926] 2 K. B. 417.

(5) [1949] 1 K. B. 605.

St. John de Vere Shortt for the landlord. When the law is altered during the pendency of an action, the rights of the parties should be decided according to the law as it existed when the action was begun: Maxwell on the Interpretation of Statutes (9th ed.) p. 229. It is submitted that, on its true construction, s. 10 shows that pending actions are not affected. This case is distinguishable from *Remon* v. *City of London Real Property Co. Ld.* (1). The provision there considered was s. 5, sub-s. 3 of the Act of 1920, and it was clear that that sub-section was intended to have a retrospective operation. In this case the issue of the plaint crystallized the landlord's right to possession: section 10 of the Act of 1949 only applies where the tenancy has not been determined before the Act comes into operation. [He referred to *Hitchcock* v. *Way* (2); *In Re Joseph Suche & Co. Ld.* (3); *Attorney-General* v. *Theobald* (4).]

EVERSHED M.R. This appeal raises the question whether the application of the new Landlord and Tenant (Rent Control) Act, 1949, to this case is excluded by reason that the plaint was issued by the landlord claiming possession against the defendant tenant before the Act came into force. Mr. Shortt has, I think, substantially conceded (but in any event it must be clear) that, having regard to the decision in *Remon* v. *City of London Real Property Co. Ld.* (1), if it had not been for the issue of the plaint before the Act came into operation, the tenant must have been entitled to claim the benefit of s. 9 of the Act of 1949 notwithstanding the service of an effective notice to quit. The real question here is, what difference

(1) [1921] 1 K. B. 49.
(2) (1837) 6 Ad. & E. 943.
(3) (1875) 1 Ch. D. 48.
(4) (1890) 24 Q. B. D. 557.

does the issue of the plaint make? [His Lordship stated the facts, and continued:] But for the Act of 1949, as has been conceded, because the scullery had been used in common for cooking purposes between the tenant and his sub-tenant, the premises would have been outside the protection of the Rent Restriction Acts. The house is plainly one which is, having regard to its rateable value, within the scope of the Acts and would be covered by them unless the way in which the premises had been used was such as to take them, during the tenancies in question at any rate, out of the Acts. One of the obvious purposes of the Act of 1949 was to alter the law as it had been established by a series of cases beginning with *Neale* v. *Del Soto* (1).

[His Lordship read ss. 9 and 10 and continued:] Mr. Shortt has rightly relied on the well-established principles prima facie applicable to the interpretation of a statute. He has quoted passages from Maxwell on the Interpretation of Statutes (9th ed.) p. 229 and has made numerous citations from authorities. I shall not, I hope, be thought unappreciative of his argument or disrespectful to the authorities cited, if I forbear from reference to all of them, because the principle in question is not in dispute, and I assume in Mr. Shortt's favour that the onus of establishing something contrary to the principle lies on those who assert it; and it is an onus which is not lightly to be discharged. So far as this case is concerned, as I have already indicated, the vital element in it is the fact that proceedings for possession were started on a date, namely, May 25, before the coming into operation of the Act of 1949. It is said that, notwithstanding the coming into operation of that Act, by the issue of the plaint the plaintiff landlord has acquired a vested right, a cause of action has accrued, and he should not be, and will not be, deprived by the court of that right unless in plain terms that conclusion flows from the language of the new Act.

To quote from Maxwell, on the Interpretation of Statutes (9th ed.) p. 229: "In general, when the law is altered during "the pendency of an action, the rights of the parties are "decided according to the law as it existed when the action "was begun, unless the new statute shows a clear intention "to vary such rights." Two of the cases seem to indicate that there should be found express reference to causes of action pending. For example, in *In re Joseph Suche & Co., Ld.* (1), Jessel M.R. sitting at first instance decided a particular case on this ground of principle. He stated his conclusion thus: "I so decide because it is a general rule that when the "legislature alters the rights of parties by taking away or "conferring any right of action, its enactments, unless in "express terms they apply to pending actions, do not affect "them." Something of the same kind, I think, may fairly be said to emerge from the language of Wilde B. in *Wright* v. *Hale* (2). Having examined the many cases cited for the landlord, I doubt whether the principle ought to be expressed in quite such precise language as Jessel M.R. used in *In re Joseph Suche & Co., Ld.* (1). In other words, it seems to me that, if the necessary intendment of the Act is to affect pending causes of action, then this court will give effect to the intention of the legislature even though there is no express reference to pending actions.

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(1) [1945] K. B. 144.

The question, therefore, really is: since a summons had been issued before the Act came into force, did the landlord acquire rights pursuant to the law as it stood before the Act was passed, and are those rights unaffected either by the express language of or by the necessary implication to be drawn from ss. 9 and 10 of the Act of 1949? Apart from the decision in *Remon* v. *City of London Real Property Co. Ld.* (3), I think that the point might have been one of very serious difficulty, nor do I think that it is an easy one now. But that case seems to me to have laid down the application of a principle to this class of legislation generally, and I think, therefore, that citations from authorities relating to wholly different subject-matters may not be so pertinent to cases of this character.

In *Remon* v. *City of London Real Property Co. Ld.* (3), two rooms not until the passing of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, covered by the Rent Acts because they were used for business purposes were, on the coming into force of that Act, in the occupation of a person who was holding over, or, rather, remaining in possession in invitum so far as the landlord was concerned, after the expiration of the notice to quit. No proceedings had actually been started when the Act of 1920 came into force. There is no doubt that the Act of 1920 brought premises of that character, namely, business premises, for a short period under

(1) 1 Ch. D. 48, 50.

(2) (1860) 30 L. J. (Ex) 40, 43.

(3) [1921] 1 K. B. 49.

what has been called the umbrella of the Act. The question raised in the case was whether, since the tenant was still actually there when the Act came into force, he could, as against his landlord, then pray in aid the Act of 1920 and resist the landlord's claim for possession. This court held that he could.

At first sight the result appears not to be in accordance with the older principles relating to real-property law, illustrated by the last case to which Mr. Shortt referred, *Grimwood* v. *Moss* (1), to the effect that, once the necessary step has been taken by the landlord to put an end to the tenancy, the person in occupation would cease to be a tenant. It is, I think, plain from the decision in *Remon's* case (2), and it has been subsequently expressly affirmed by Scrutton L.J. in *Cruise* v. *Terrell* (3), that those principles do not strictly apply in the case of premises which are brought within and intended to be protected by this particular kind of legislation. Thus Bankes L.J. said (4): "It is, however, clear that in all the Rent Restrictions Acts "the expression 'tenant' has been used in a special, a peculiar "sense, and as including a person who might be described as "an ex-tenant, some one whose occupation had commenced "as tenant and who had continued in occupation without "any legal right to do so except possibly such as the Acts "themselves conferred upon him. The respondent therefore "on the coming into operation of the new Act was a tenant "within the meaning of that expression in the Act." It is on that principle that *Remon's* case (4) was decided. Here the difference is, of course, that a plaint had been issued. Is it the result that this tenant has ceased to be a tenant within the meaning of this legislation or is otherwise outside the protection which s. 9 of the new Act intends to give him?

I observe that the county court judge in his careful judgment, after stating the facts, proceeds as follows: "I have no doubt "whatever that the relevant contract to be considered is the "letting of the two rooms with the use of scullery in 1945." I agree with that premiss to the argument following in the judgment. In other words, if I look at s. 9 of the Act I read these words: "Where the tenant of any premises, "being a house or part of a house, has sublet a part." It seems to me that when this matter comes before the court

(1) (1872) L. R. 7 C. P. 360.
(2) [1921] 1 K. B. 49.
(3) [1922] 1 K. B. 664, 673.
(4) [1921] 1 K. B. 49, 54.

those conditions, prima facie, are satisfied. The tenant has (in the past) sublet a part. Next, following *Remon's* case (1), the tenant here is, prima facie, a tenant occupying part of premises within the general scope of the Acts. He is an ex-tenant sitting there against the will of his landlord and claiming, as he did in his pleading, that the Rent Acts protect him. Whether they did or not might perhaps depend on the exact facts in regard to the scullery and its use ; but, at any rate, that was his position : he was a person claiming the protection of the Acts.

Section 9 continues : " No part of the premises shall be " treated as not being a dwelling-house to which the principal " Acts apply by reason only," etc. Mr. Short says that " shall " is a future word, and therefore he relied on the principles referred to in the passages already quoted as establishing that the section is not applicable to some cause of action which had already crystallized on the issue of the plaint before this Act came into operation. If the matter stood there alone, I think that there might be force in that argument ; but s. 10 provides that the last three foregoing sections shall apply whether the letting in question began before or after the commencement of this Act. What is the letting in question ? Following *Remon's* case (1), I think that this tenant is a tenant prima facie, and that he was such when the summons was issued. He was a tenant, and the letting in question, as the county court judge has said, was the contract of 1945. I think it follows, therefore, that s. 9 is made in the clearest possible terms to apply to this relevant tenancy. If it applies to this relevant tenancy, then by the peculiar provisions of these Acts the court is told that it shall not make an order for possession save in certain circumstances. Prima facie, it seems to me that the tenant must be entitled so to say.

There only remain the last three lines of qualification to s. 10 : " But not so as to affect rent in respect of any period before " the commencement thereof or anything done or omitted " during any such period." The obvious purpose and meaning of that qualification is that it disentitles the tenant from saying to the landlord : " Well, all along in the past we have " assumed because of *Neale* v. *Del Soto* (2) that I was not " protected by the Act and you have charged me more than

(1) [1921] 1 K. B. 49. (2) [1945] K. B. 144.

"the standard rent and must repay the excess." The landlord, again, might have been successful in recovering possession by some order of the court. Those things are not to be open to review: they are things done.

The express reference to "rent," however, seems to me to show that those words "anything done" cannot refer to such a step taken as the mere issuing of a summons. Clearly they cannot refer to the notice to quit—at least, so I hold. I think it impossible, on a fair reading of this section together with s. 9 (always bearing in mind the peculiar character of this rent-restriction legislation), to say that s. 10 means that s. 9 should not apply to any pending cause of action. It would, of course, be easy to say that if that had been intended. I think that s. 10 must and can only mean in its context some act performed whereby the tenant has either gone out, or has paid something or done something, upon the footing that he was unprotected, before the Act comes into force. The tenant here has suffered none of these things. He has resolutely remained in possession under the terms of his tenancy, asserting the protection of the Act. Had it not been for the Act of 1949, he might well have failed in making good that assertion. But it seems to me that he is now, and was before the county court judge, entitled to say that "his letting is now exempted "from the disqualifying effect of *Neale* v. *Del Soto*" (1).

The county court judge, when he came to consider that part of the case, after referring to *Remon's* case (2), said: "For the "proposition that the crucial time for consideration is the "date of the issue of the writ or plaint I refer to *Prout* v. *Hunter* "(3), *Leslie & Co., Ld.* v. *Cumming* (4), and *Turner* v. "*Baker* (5)." With all respect to the county court judge, I do not think that that is a good point. In those cases the question raised was on what date it is relevant to discover whether on the facts there was a letting within the properly applicable legislation. As Mr. Sofer pointed out, we are concerned here with the question what is the law applicable at the hearing. We have to look at the statute and, if my view of it is right, it is saying plainly that it has a retrospective effect. That being so, the only question is—and I come back to the same point—whether s. 10 by the last few lines has the effect of saying that this Act applies to pre-existing tenancies with all the consequences which flow from that application, but that nevertheless something here has been done and that that thing done is to be unaffected; and whether then the landlord must go on to say that the cause of action crystallizing on the issue of the summons is something done, the full effect of which must in no way be minimized or otherwise affected by the Act. For the issue of the summons (if that be a thing done) is not, as such, in any circumstances affected. The landlord must go on to say that when the summons comes to be heard (a thing not done when the Act was passed) that hearing must proceed as though the Act of 1949 had not been passed. I do not think that this is a fair or possible construction of ss. 9 and 10. Differing, therefore, as I do with diffidence, from the county court judge upon any matter in which county court judges are so peculiarly experienced, I have come to the conclusion here that he wrongly applied the principle of *Prout* v. *Hunter* (1) and the other cases, and that the right answer is that this Act retrospectively applies to protect and save the tenant in this case.

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(1) [1945] K. B. 144.
(2) [1921] 1 K. B. 49.
(3) [1924] 2 K. B. 736.
(4) [1926] 2 K. B. 417.
(5) [1949] 1 K. B. 605.

COHEN L.J. I am of the same opinion, but, as we are differing from the county court judge, I will state shortly my reasons. The county court judge came to the conclusion that the fact that the plaint had been issued before the law was altered by the Landlord and Tenant (Rent Control) Act, 1949, made the principle of *Remon's* case (2) inapplicable to the present case. He bases his conclusion on *Turner* v. *Baker* (3), and the other cases which my Lord has mentioned. In my opinion, those cases do not assist us in the decision of the present case. They establish that, in considering the problem then before the court, the law must be applied to the state of facts existing at the date of issue of the plaint. They are not relevant to the question before us, which is whether the law to be applied is that in force at the date of the issue of the plaint, or whether the result of the action is affected by an alteration of the law subsequent to that date. In the particular case before us the question is whether ss. 9 and 10 of the Landlord and Tenant (Rent Control) Act, 1949, had the effect of making the tenant in this appeal a protected tenant, although had the law not been altered the landlord would have been entitled to possession; in other words, has s. 9, having regard to s. 10,

(1) [1924] 2 K. B. 736.
(2) [1921] 1 K. B. 49.
(3) [1949] 1 K. B. 605.

C. A.
1949
HUTCHINSON
v.
JAUNCEY.
Cohen L.J.

retrospective effect, and, if so, how far? For the reasons given by my Lord, with which I entirely agree, I think that the intention of the section is plainly that the alteration of the law shall have retrospective effect. The issue of a plaint is no doubt an act done within s. 10; but it is not equivalent to judgment. *Remon's* case (1) I think, shows that nothing but delivery of possession or an order for possession can effectively deprive the occupying tenant of his possession. The plaint, therefore, stands as an act done; but when the county court judge has to apply the law in dealing with that plaint he must, in my opinion, give retrospective effect to s. 9, and he should have dismissed the action. For these reasons I would allow the appeal.

ASQUITH L.J. I agree. In particular it does not seem to me that it can possibly be argued that the application by s. 10 of s. 9 to this letting would affect anything done within the concluding words of s. 10. It is said that the issue of the plaint is something done; but, assuming that it is, the application of s. 9 to that letting does not invalidate or in any way affect the issue of the plaint. What is "affected" is something quite different, namely, the result of the action, and that is not something done. For these and the other reasons given by my Lords I agree with the order proposed.

Appeal allowed.

Solicitors: *Avery, Son & Fairbairn; Wedlake, Saint & Co.*

(1) [1921] 1 K. B. 49.

B. A. B.

JAMES LAMONT & CO. LD. *v.* HYLAND LD.

C. A.

1950
Jan. 30 ;
Apr. 5.

Tucker and Asquith L.JJ. and Roxburgh J.

Procedure—Appeal—Abandonment—Request to have appeal dismissed initialled by president of the court—No order drawn up or entered—Fresh notice of appeal given—Practice direction, 1938 (*Note to Or.* 58, *r.* 8, *Annual Practice,* 1948, *p.* 1330).

Bill of Exchange—Action on—Defence and counterclaim for unliquidated damages for breach of contract—Procedure under Or. 14—*Liberty to sign immediate judgment for amount of bill and interest.*

Where a request by the appellant stating that he is sui juris and asking to have his appeal dismissed has been initialled by the president of the court (in accordance with the practice laid down in 1938) but no order has been drawn up or entered, the court remains master of the situation and can in its discretion allow the appeal to proceed.

In re Samuel [1945] Ch. 364, considered.

Where an action is between the immediate parties to a bill of exchange and the matters relied on by the defendant afford no defence under the Bills of Exchange Act, the judge in chambers, in proceedings under Or. 14 may properly, in the exercise of the powers vested in him, give liberty to the plaintiff to sign immediate judgment.

APPEAL from Lynskey J., in chambers.

On November 11, 1949, the plaintiffs, James Lamont & Co. Ld., were given leave by Lynskey J., in chambers, to sign final judgment under Or. 14 for 20,575*l.* 6*s.* 10*d.* in an action on a bill of exchange drawn by the plaintiff and accepted by the defendants in respect of shipbuilding work on a vessel belonging to the defendants. Notice of appeal was given by the defendants in due course, but on November 14, the solicitors then acting for them wrote to the plaintiffs that a bankers' draft for payment of the amount of the judgment was being sent, and on the same day a cheque was sent to the plaintiffs and the defendants by their solicitors signed a consent to the dismissal of their appeal in the following terms : "We "consent to the dismissal of the appeal herein, all parties "being sui juris." That request for the dismissal of the appeal was initialled by the president of the court, but no order was in fact drawn up or entered. On November 23, the defendants, having changed their minds and also their solicitors, gave a fresh notice of appeal.

B. J. M. MacKenna for the plaintiffs raised a preliminary objection. The appeal will not lie. The practice is laid

C. A.

1950

James Lamont & Co. Ld. *v.* Hyland Ld.

down in the Annual Practice for 1948 at p. 1330 (see note to Or. 58, r. 8) (1). The initialling by the presiding judge of the defendants' request for the dismissal of his appeal is equivalent to an order dismissing the appeal, and the defendants must therefore satisfy the court that they should in the court's discretion be allowed to bring a fresh appeal. They do not allege that there has been any change of fact or that there has been any trickery on the part of the plaintiffs. It would be an abuse of the practice and procedure of the court to allow an appellant to blow first hot and then cold.

[*In re Samuel* (2) referred to.]

Ashe Lincoln K.C. and *P. Bristow* for the defendants. No order having been drawn up or entered on the request for the dismissal of the appeal it is submitted that the court has a discretionary power to allow the appeal to proceed and should in the present case exercise that discretion in favour of the defendants. There has been no delay in issuing the new notice of appeal and the plaintiffs having received payment, will not be in any way embarrassed.

Tucker L.J. stated the facts and continued: The position under the practice of 1938 was considered by this court in *In re Samuel* (2), the headnote to which is as follows: "Under the practice laid down in 1938 (see note to Or. 58, r. 8, "in Annual Practice, 1944, p. 1301) an appellant who is sui "juris may submit an application to have the appeal dis-"missed and on this application being initialled by the "president of the court the appeal will be dismissed with "costs. It follows that, notwithstanding the signing by both "parties of a form of consent to an appeal being abandoned, "the notice of appeal remains on foot; and the court will "allow the appeal to be proceeded with on this notice of "appeal, unless it considers that by reason of what has "happened the respondent has changed his position dis-"advantageously: Quaere, whether in such a case the court

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(1) Annual Practice, 1948, p. 1330, note to Or. 58, r. 8: "Where an appellant is sui "juris and does not desire to "prosecute an appeal, he may "present a request signed by his "solicitor stating that he is sui "juris and asking to have the "appeal dismissed, in which case "(subject to the request being "initialled by the president of "the court) the appeal will be "dismissed and struck out of the "list, and an order will, if "necessary, be drawn up "directing payment of the costs."

(2) [1945] Ch. 364.

"would allow a new notice of appeal to be given. As under "the existing practice an appellant can obtain the dismissal "of an appeal without securing the respondent's consent, "a consent signed by both parties cannot set up any con"tractual relationship. *Watson* v. *Cave* (1), discussed and "not followed having regard to the change in the practice."

The facts in that case were that a trustee in bankruptcy sought to abandon his appeal and obtained the respondent's consent; but subsequently he desired to proceed with his appeal, and that is how the matter came before the court. It is to be observed that in that case the document of consent never came before the president of the court to be initialled, and accordingly the appeal was never dismissed. Lord Greene M.R. discussed the practice and the history of this matter since the alteration of the practice in 1938. He said: "No order has been made dismissing the appeal: the notice "is still a live notice unless there be some reason which would "induce the court to say that in the circumstances the trustee "should not be allowed to proceed with that notice"; and later: "I cannot myself see how such an order could have "been made. Under the present practice, when once an "order has been drawn up and entered, pursuant to an applica"tion by the appellant duly initialled by the president of the "court to dismiss the appeal, there is an end of the appeal, "and I cannot see that the court would have jurisdiction to "grant leave to serve a fresh notice of appeal in respect of an "appeal which is brought to an end by the order dismissing "it."(2)

I think it is clear that, until an order has been drawn up and entered, the appeal is not dismissed. The signing of the consent and the initialling by the president of the court is all preliminary machinery leading up to the drawing up and entry of the order. It may be that very often no order is drawn up: frequently no orders are drawn up unless the taxation of costs is required. But if an order is not drawn up and entered, a respondent may find himself in a difficulty. None the less, in the present case, the consent having been initialled by the president of this court, the matter is on the same footing as if an application had been made in open court and dealt with. The procedure of initialling these consents is merely for the purpose of saving time and expense, and it affords exactly the same authority to the officials who draw up the proper

(1) (1881) 17 Ch. D. 23. (2) [1945] Ch. at 367, 370.

order as an order made in court. Accordingly, I think that, where this court has, under that procedure, in effect made an order which has not been drawn up, it has power to refuse to allow the matter to be proceeded with by a fresh notice of appeal or by the party seeking to rely on the original notice of appeal.

I think that we are masters of the situation ; and, although in some cases it would be an abuse of the practice and procedure of the court to allow a party to blow hot and cold in this way, I think that the matter is one which is within our discretion, and that, unless and until an order has been drawn up and entered, we can give leave to allow the matter to proceed. The present case is an exceptional one in that the plaintiffs are in possession of a sum of 20,500*l.* odd—they have the money ; a very short time elapsed before the change of mind ; and there is no suggestion that the plaintiffs have altered their position or would in any way be embarrassed by our allowing this appeal to proceed. In all the circumstances, and subject to questions of costs, I think that we should exercise our discretion by allowing the appeal to proceed, no order having been drawn up or entered.

Asquith L.J. I agree.

Roxburgh J. I also agree.

Leave to proceed with appeal.

The appeal was then heard.

The facts and arguments sufficiently appear from the judgment.

Cur. adv. vult.

April 5. Roxburgh J. read the judgment of the court. The plaintiffs' claim was (1.) for 20,000*l.* (and 575*l.* 6*s.* 10*d.* interest) against the defendants as acceptors of a bill of exchange drawn on them by the plaintiffs for that amount, and (2.) for 15,141*l.* odd for work and material. This court is not concerned with the second head of claim. As regards the claim on the bill of exchange, the plaintiffs, in proceedings for summary judgment under Or. 14, swore a common-form affidavit verifying the cause of action. The defendants put in an affidavit in opposition to judgment by the defendants' managing director (the contents of which will be considered later) indicating an intention to counterclaim. The master gave the plaintiffs liberty to sign judgment for 20,000*l*., plus 575*l*. interest, subject to a stay of execution pending trial of the defendants' counterclaim. Both parties appealed from the master's decision the defendants asking for unconditional leave to defend, the plaintiffs asking that the stay pending trial of the counterclaim be removed.

Lynskey J., before whom these appeals came, dismissed the defendants' appeal' and allowed the plaintiffs' appeal against the stay : that is to say, he gave the plaintiffs liberty to sign immediate judgment for the amount claimed on the bill, and interest. From that decision the defendants appeal to this court, reiterating their request for unconditional leave to defend.

The affidavit in opposition to judgment which was before the master, sworn by the defendants' managing director can be summarized as follows : He deposed that early in 1948 the defendants employed the plaintiffs to repair and alter a ship. There was a specification and estimate for 15,000*l*. He alleges that it was a condition of this contract that the repairs and alterations should be completed in time for the ship to reach Palermo by December 1, 1948. He says that later there was a contract to pay reasonable charges for repairs up to 40,000*l*., subject to the same conditions, the reason for which was that the ship had been chartered to carry displaced persons at a very high profit (100,000*l*.) conditionally on its being ready by December 1, 1948. He goes on to say that it was later agreed to raise the maximum of the repairs, etc., to 50,000*l*., of which the defendants paid the plaintiffs 30,000*l*. on account, having accepted a bill of exchange for 20,000*l*. for the balance. He says that the plaintiffs violated the condition—failed to complete the repairs within the stipulated time—and that the defendants have lost a profit of 100,000*l*. The defendants therefore have a counterclaim for breach of contract far over-topping the claim on the bill of exchange, and they say that they are entitled to set off a sufficient amount of it to extinguish the claim.

There was no affidavit in reply to this before the master, who, as has been seen, gave liberty to sign judgment on the bill of exchange subject to a stay of execution. Before Lynskey J., on appeal, an affidavit in reply was sworn by the secretary of the plaintiff company which is completely at variance with the case set up in the defendants' affidavit.

This deponent denies the successive sums of 15,000*l.*, 40,000*l.* and 50,000*l.* alleged as successive contractual maxima in that affidavit, and alleges a contract to do the work contracted for, subject to the Minister of Transport's approval, on the plaintiffs' usual terms, that is to say, cost plus certain specified percentages. He denies that it was a condition of the contract that the ship should be ready to reach Palermo by December 1, 1948. He says that the defendants' managing director had, on October 4, 1948, said that he had 200,000*l.* worth of stores at Malta, much of which had been stolen, and had requested that, to save further loss, the ship might be ready by October 20. The plaintiffs never promised this, but had said that they would do their best; and the ship would, so far as their part was concerned, in fact have been at Palermo before December 1, 1948, but for circumstances such as running aground on October 21 and losing her stern anchor in trials in early November—circumstances for which the plaintiffs' were in no degree responsible. He says that the defendants' managing director gave him the bill for 20,000*l.*, dated November 1, on November 5 or 6, as a payment on account. (No doubt part of the consideration was also release of the ship from the plaintiffs' lien as repairers.)

The position in law arising on these affidavits is therefore shortly that the plaintiffs sue on a bill of exchange, and that the defendants seek to prevent the plaintiffs from having liberty to sign immediate judgment without a stay by alleging that the bill was given in pursuance of a contract which the plaintiffs have broken, and for which the defendants claim unliquidated damages in excess of the amount of the bill. On these materials the judge has given liberty to sign judgment for the amount of the bill with interest and without any stay.

This court has recently decided in *Morgan & Son* v. *Martin Johnson & Co. Ld.* (1) that, where the matters relied upon by the defendant, although not strictly matters of defence, would before the Judicature Acts have been regarded by a court of equity as grounds for relief by way of equitable set off, the proper order to make under Or. 14 procedure as a general rule is that the defendant have unconditional leave to defend, and not that the plaintiff recover judgment with execution stayed until the trial of the counterclaim.

The question raised in the present appeal is whether this rule applies to an action between immediate parties to a bill

(1) [1949] 1 K. B. 107.

of exchange, where the matters relied upon by the defendant afford no defence under the Bills of Exchange Act. In such cases, although it is not easy wholly to reconcile the authorities, a rule more favourable to the plaintiff has in general prevailed, the court treating the execution of a bill of exchange either as analogous to a payment of cash, or as amounting to an independent contract within the wider contract in pursuance of which it was executed and not dependent as regards its enforcement on due performance of the latter.

Mr. MacKenna for the plaintiffs cited in particular three cases which illustrate this rule or tendency. Some of them are pre-Judicature Act and pre-Or. 14 cases. The first in order of time is *Glennie* v. *Imri* (1), a case decided on the equity side of the Court of Exchequer, long before the days of Or. 14. The plaintiff sued on a bill of exchange given for goods sold and delivered. The defendant, using the language of that day, set up that he had been " fraudently deceived in " his contract, the goods delivered being inferior both in " quality and quantity to what he had ordered. Held, that " he could not maintain a bill for an account or for an injunction " to restrain the action, inasmuch as his object was to reduce " the amount of the bill of exchange, by the damages which " he claimed for the alleged breach of contract, and that, " as this is not the subject of set off at law, it cannot be the " subject of account in equity. Courts of Equity will not " take an account of debts one way and damages the other " A court of law would say you must pay the bill first and then bring an action for the fraud; and apparently where a bill of exchange was concerned, equity in this matter followed the law.

The second case cited to us under this head was *Warwick* v. *Nairn* (2). The plaintiff supplied the defendant with goods under a contract and drew a bill of exchange for 313*l.* odd, of which all but 108*l.* odd was in respect of their price. The defendant pleaded that the plaintiff had promised that the goods should be of a certain quality and that he accepted the bill of exchange on the faith of that promise, which, he alleged, had been broken. On demurrer this was held a bad plea. During the argument Pollock C.B. said: " The payment by " a bill of exchange is to be taken as the payment of so much " cash; the defendant ought to satisfy the bill and proceed " upon the remedy for the breach of warranty." Counsel

(1) (1839) 3 Y. & C. 436.

(2) (1855) 10 Ex. 762.

arguing in support of the demurrer contended that such a partial failure of consideration cannot be pleaded to a bill of exchange or promissory note. Parke B., intervened and stopped him with the observation: "The subject-matter "of the plea" (that is in that case the alleged inferior quality of the goods) "has been held on several occasions to afford no "defence to an action on a bill of exchange: *Morgan* v. "*Richardson* (1), and *Trickey* v. *Larne* (2) are direct authorities "against the plea." There might, it appears, have been a defence if it had been alleged that the goods tendered had not been of the contract description and had been rejected, for then there would have been a total failure of consideration, and this is a defence to an action on a bill of exchange; but in the actual case the "inferior" goods were retained by the deliveree, and the failure of consideration therefore was partial only. So also in the present case. The same principle was applied in *Jackson* v. *Murphy* (3).

In *Court* v. *Sheen* (4), a different result was reached on similar facts, and the plaintiff was refused liberty to sign immediate judgment. But the case is even more shortly reported than *Jackson* v. *Murphy* (3), and it is difficult or impossible to say on what grounds it proceeded.

Lastly, among the bill of exchange cases is that of *Anglo-Italian Bank* v. *Davies* (5). The plaintiffs, by specially endorsed writ, sued the defendant on certain promissory notes and took out a summons under Or. 14. The defendants resisted on the ground that they had a good defence and a good counterclaim. Thesiger L.J. said: "If the appellant had "disclosed by their affidavits facts sufficient to establish a "good ground of counterclaim, I think the counterclaim "would have been sufficiently connected with the cause of "action in the present case to justify its being set up as a "defence, even to a liquidated claim on a bill of exchange." In the result, however, leave to defend on the bills was refused. Jessel M.R., anticipating the possibility envisaged by Thesiger L.J., strikes rather a different note. He said (6): "I must "say, speaking for myself that I should hesitate long before "I allowed a defendant in an action on a bill of exchange to "set up a case for damages by reason of the breach by the "plaintiff of some other contract or the commission of some

(1) (1806) 7 East 482, n.
(2) (1840) 6 M. & W. 278.
(3) (1886) 4 T. L. R. 92.
(4) (1891) 7 T. L. R. 556.
(5) (1878) 38 L. T. 197.
(6) Ibid., p. 199.

"tort." (Pausing there, it would seem that the Master of the Rolls means by "some other contract" some contract other than that constituted by the bill of exchange itself.) He continues: "I do not say there cannot be a case where the "two transactions may not be so connected, but at present "I cannot even imagine the existence of such a special case."

Having regard to the tenor of the authorities summarized above in cases where the action is on a bill of exchange, it is impossible to say that in giving liberty to sign immediate judgment without a stay the judge in chambers was guilty of an improper exercise of the discretion vested in him. In our view the appeal fails.

Appeal dismissed.

Solicitors: *Sydney Morse & Co.; Torr & Co., for Morton, Morton & Shaw, Sunderland.*

A. W. G.

ZEIDMAN *v.* OWEN.

1950
Jan. 19.

Lord Goddard C.J. and Lynskey J.

Gaming—Pool betting—Football pool—Using premises for "pool betting "transactions"—Betting and Lotteries Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *s.* 3, *sub-s.* 2.

The expressions "pari mutuel" and "pool betting" in s. 3 of the Betting and Lotteries Act, 1934, are not synonymous; and the expression "pool betting" includes football-pool betting.

Where, therefore, persons visited the premises of the defendant, a collector for football-pool competitions, and handed him completed football-pool coupons and sums of money by way of stakes,

Held, that he had contravened s. 3, sub-s. 2, because pool-betting transactions had been effected by persons resorting to his premises.

Stovell v. *Jameson* [1940] 1 K. B. 92, followed.

Bretherton v. *United Kingdom Totalisator Co. Ld.* [1945] K. B. 555 discussed.

Dicta of Lord Greene M.R. in *Elderton* v. *United Kingdom Totalisator Co. Ld.* [1946] Ch. 57, 62, 63, not followed.

CASE STATED by London Sessions.

The defendant acted as a collector for football pools. During certain evenings of March, 1949, a number of persons visited premises in London and handed to the defendant

1950

ZEIDMAN
v.
OWEN.

football-pool coupons, which they had filled in, and sums of money. He was convicted by a metropolitan magistrate of using the premises as a place where persons resorting thereto might effect pool-betting transactions, contrary to s. 3, sub-s. 2, of the Betting and Lotteries Act, 1934 (1).

The defendant appealed to quarter sessions. It was contended for him that, having regard to a dictum of Lord Greene M.R. in *Elderton* v. *United Kingdom Totalisator Co. Ld.* (2), football-pool competitions were not pool betting transactions within the meaning of s. 3, sub-s. 2, of the Act of 1934.

It was contended for the prosecution that that dictum was obiter and not necessary for the decision of that case, and that the law today was accordingly that laid down in *Stovell* v. *Jameson* (3).

Quarter sessions held that the contention of the prosecutor was correct, and that the defendant was guilty of the offence charged.

He now appealed to the Divisional Court.

Curtis-Bennett K.C. and *Gordon Hardy* for the defendant. Lord Greene M.R. was clearly of opinion in *Elderton* v. *United Kingdom Totalisator Co. Ld.* (2) that the operation of a football pool was not "pool betting" within the meaning of the Betting and Lotteries Act, 1934, and the judgment in that case of du Parcq L.J. (1) is not inconsistent with that view. Morton L.J. said, moreover, (2): "For my part, I am by no "means satisfied that football pools come within the term "'pool betting' as that term is used in this particular statute." It is conceded that the present case is on all fours with *Stovell* v. *Jameson* (3) on its facts, and that Lord Greene M.R.'s dictum in *Elderton* v. *United Kingdom Totalisator Co. Ld.* (4) was obiter. But the present question was never argued in *Stovell* v. *Jameson* (3). The wording of s. 26, sub-s. 1, of the Act of 1934 indicates that "pari mutuel" and "pool betting" are not mutually exclusive. The title of the Act shows which matters it was intended to cover, and football pools do not fall within the scope of that title, or within the scope of the Act.

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(1) Betting and Lotteries Act, 1934, s. 3, sub-s. 1: "No pari "mutuel or pool betting business "shall be carried on on any track, "except (*a*)—on an approved "horse racecourse . . . . or (*b*) on "a licensed track being a dog "racecourse . . . ."

Subsection 2: "Save as is "permitted by the preceding "subsection, no person shall use "any premises whether situate "on a track or not, or cause "or knowingly permit any such "premises to be used, as a "place where persons resorting "thereto may effect pari mutuel "or pool betting transactions."

Section 26, sub-s. 1: "It shall "be unlawful to conduct in or "through any newspaper, or in "connexion with any trade or "business . . . . (*a*) any competi- "tion in which prizes are offered "for forecasts of the result either "of a future event, or of a past "event the result of which is not "yet ascertained or not yet "generally known . . . . Provided "that nothing in this subsection "with respect to the conducting "of competitions in connexion "with a trade or business shall "apply in relation to pari-mutuel "or pool betting operations "carried on by a person whose "only trade or business is that of "a bookmaker as defined in "Part I of this Act."

(2) [1946] Ch. 57, 62, 63.

(3) [1940] 1 K. B. 92.

Melford Stevenson K.C. and *Gattie* for the prosecutor. The difficulty presented by the observations of Lord Greene M.R. in *Elderton* v. *United Kingdom Totalisator Co. Ld.* (4) is that he treated "pari mutuel" and "pool betting" as synonymous. They are not. "Pari mutuel" is only one species of the genus "pool betting." It appears from the Dictionnaire Larousse that "pari mutuel" is the only form of betting recognized by French law. "Pari mutuel" means literally "betting amongst ourselves." Betting on a totalisator is "pari mutuel": see the definition of "totali-"sator" in s. 20, sub-s. 1, of the Act of 1934. The definitions of "pool betting" in s. 6, sub-s. 5, of the Finance (No. 2) Act, 1947, and s. 14, sub-s. 2, of the Finance Act, 1948, are a guide to the meaning of "pool betting" in the Act of 1934, and indicate that the phrase includes football pools. The Betting Act, 1853, s. 1, did not apply to pool betting, and the Act of 1934 was passed to remedy that mischief. By 1934 football pools were a well established phenomenon in this country: no other form of pool betting was in common use. It is clear, therefore, that the Act of 1934 was intended to apply to football pools. It had never been suggested in any case before *Elderton* v. *United Kingdom Totalisator Co. Ld.* (5) that football-pool betting was not "pool betting." [Counsel referred to *Bretherton* v. *United Kingdom Totalisator Co. Ld.* (6).]

Hardy, in reply. The fact that "pool betting" was specifically defined to include football pools by the Finance (No. 2)

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(1) [1946] Ch. 70.
(2) Ibid. 72.
(3) [1940] 1 K. B. 92.
(4) [1946] Ch. 57, 62, 63.
(5) [1946] Ch. 57.
(6) [1945] K. B. 555.

Act, 1947, s. 6, sub-s. 5, and the Finance Act, 1948, s. 14, sub-s. 2, shows that there was then a doubt as to the meaning of " pool betting." If " pool betting," in its ordinary meaning, included football pools, there would have been no need to define it.

LORD GODDARD C.J. This case stated raises a question of some importance with regard to the construction to be placed on s. 3 of the Betting and Lotteries Act, 1934.

The defendant acted as a collector for football pools. Competitors took to him the coupons which they had filled in and the stake which they were investing, if that be the right word, in these football pools. As they physically resorted to the house where the defendant lived, paid over the money to him there, did not conduct the business by post, and he was appointed a collector by the promoters of the football pool, it is said that he committed an offence against s. 3, sub-s. 2, of the Act. There is no question that this court decided in *Stovell* v. *Jameson* (1), on facts which are indistinguishable from those in the present case, that an offence had been committed; but the present appeal is brought because it is submitted that in a subsequent case, *Elderton* v. *United Kingdom Totalisator Co. Ld.* (2), the Court of Appeal, or, at any rate, Lord Greene M.R., indicated clearly (3) that football pools were not pools betting transactions within the meaning of the Act.

The court in that case was considering s. 26 of the Act and not s. 3, and Lord Greene's observations were obiter. It is not suggested that they are binding on this court, but naturally we have given them careful consideration. Where I venture to differ from Lord Greene in this matter is that he has construed s. 26 as though the words " pari " mutuel or pool betting " referred to one and the same thing. He was construing the words " pool betting " as a translation of the words " pari mutuel." I prefer to read s. 3, sub-s. 2, in this way: " . . . . as a place where persons resorting " thereto may effect pari mutuel transactions or as a place " where persons resorting thereto may effect pool betting " transactions "; and we have then to consider whether football pools are pool-betting transactions within the meaning of those words.

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(1) [1940] 1 K. B. 92.
(2) [1946] Ch. 57.
(3) Ibid. 62, 63.

At the time when the Act of 1934 was passed football pools had become well known and well established. Whether they were as widely patronized as they are at the present day I do not know, nor does it matter. They were the only form of pool-betting transaction which was then known, except in so far as the totalisator was being used on racecourses. Totalisators are expressly referred to in the Act, and there are separate provisions for them.

In construing any Act of this kind, I often bear in mind the words of Lindley M.R. in *Thomson* v. *Lord Clanmorris* (1). He there said with regard to the Civil Procedure Act, 1833: " In construing s. 3 of the Act of 1833, as indeed in construing " any other statutory enactment, regard must be had not " only to the words used, but the history of the Act, and the " reasons which led to its being passed. You must look " at the mischief which had to be cured as well as at the cure " provided." If I bear those words in mind, I cannot resist the conclusion that Parliament, in using the expression " pool " betting transactions," had in mind the form of competition known as football pools, which, at that time, were just becoming well known and widespread.

It is true that certain other sections in the Act refer expressly to what are called prize competitions. It is also true that in *Bretherton* v. *United Kingdom Totalisator Co. Ld.* (2) this court held that football pools were prize competitions within the meaning of s. 26 of the Act; but it does not seem to me that, because they are prize competitions so as to be caught by the words of s. 26, they may not also be betting transactions.

Section 26 seems to me to recognize that a transaction may be a pool-betting transaction although at the same time it is a competition; otherwise it would be difficult to give any meaning to the proviso.

The operation of football pools is well known and I need not describe them in any detail. I think that the true view of them is that the entrants for the competition are betting one against the other. They are, no doubt, competing for the pool, but they are also, as it seems to me, staking a sum of money not really on the result of a particular football match or matches, but on the chance that their forecast will be more accurate than the forecasts of the other entrants for the pool.

In *Attorney-General* v. *Luncheon and Sports Club Ld.* (1), where the question was whether a company which owned and carried on a club and there maintained and operated a totalisator machine was a bookmaker with whom the members of the club made bets within the meaning of s. 15 of the Finance Act, 1926, the House of Lords held that the club was not a bookmaker. Lord Buckmaster in his speech, with which Lord Sumner agreed, indicated that in his opinion in totalisator betting there was a betting by the members one with another. So, I think, in football-pool competitions, there is a betting by the entrants one with another. They are not betting with the promoter. The promoter is merely the person who organizes the pool and enables the entrants to bet one with another. The fact that a football pool is a competition does not therefore in my opinion prevent its also being a betting transaction.

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(1) [1900] 1 Ch. 718, 725.

(2) [1945] K. B. 555.

(3) [1929] A. C. 400.

Lynskey J. has called my attention to the definition of bookmaker in s. 20, sub-s. 1, of the Act of 1934: " . . . . ' book-" ' maker ' means any person who, whether on his own account " or as servant or agent to any other person, carries on, whether " occasionally or regularly, the business of receiving or " negotiating bets or conducting pari mutuel or pool betting " operations, or who in any manner holds himself out, or " permits himself to be held out in any manner, as a person " who receives or negotiates bets or conducts such operations, " and ' bookmaking ' shall be construed accordingly; so, " however, that a person shall not be deemed to be a bookmaker " by reason only of the fact that he operates, or is employed " in operating a totalisator, and the operating of a totalisator " shall be deemed not to be bookmaking." That again, I think, shows that pool betting and totalisator betting are different transactions.

For those reasons I think that quarter sessions came to a right conclusion, and that the appeal fails and should be dismissed.

LYNSKEY J. I agree with the judgment just delivered, and am only delivering a separate judgment because Lord Greene M.R. took a different view of the construction of the Act of 1934 in *Elderton* v. *United Kingdom Totalisator Co. Ld.* (1). In my view, the legislature, in using the expression " pari mutuel or pool betting " transactions or operations in s. 3, sub-s. 2, and s. 26, is referring to two different types of transaction. The pari-mutuel transaction is a well known one, and for the purposes of this Act, apparently, includes the use of a totalisator. The totalisator means (s. 20, sub-s. 1) "the contrivance for betting known as the "totalisator or pari-mutuel, or any other machine or instrument "of betting of a like nature, whether mechanically operated "or not." By 1934 football-pool betting was well known. I asked Mr. Curtis-Bennett in the course of the argument if he could suggest anything else to which those words referred if they did not refer to football-pool betting or similar types of pool betting, and he could not suggest any other type of transaction of a general nature to which the Act was likely to be referable. In those circumstances in my view Parliament at that date was in fact referring to transactions of the kind generally effected through the medium of football pools and their promoters. That seems to me to be confirmed by the definition of a "bookmaker" in s. 20, sub-s. 1, to which my Lord has already made reference.

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(1) [1946] Ch. 57, 62, 63.

Lord Greene M.R. took the view in *Elderton* v. *United Kingdom Totalisator Co. Ld.* (1) that the expression "pool "betting" was simply an explanation in English of the French phrase "pari-mutuel." With every respect to Lord Greene, I am unable to accept that construction, and my view of this matter is borne out to some degree by Parliament's use of the same phrase in later legislation. By the Finance (No. 2) Act, 1947, a betting tax was imposed on pool transactions. The tax is described in the sidenote to s. 6 of the Act as "Pool-betting "duty," and s. 6, sub-s. 1, provides: "There shall be charged "on all bets made by way of pool betting, other than bets "made by means of a totalisator set up on an approved "racecourse by or under the authority of the Racecourse "Betting Control Board, a duty of excise, to be known as "the pool-betting duty, equal to 10 per cent. of the amount "of the stake money paid." Sub-section 5 of that section provides: "Bets shall be deemed for the purposes of this "section and the said Fifth Schedule to be made by way "of pool betting whenever a number of persons make bets "on terms that the winnings of such of those persons as are "winners shall be, or be a share of, or be determined by reference "to, the stake money paid or agreed to be paid by those persons, "whether the bets are made by means of a totalisator, or "by filling up and returning coupons or other printed or

(1) [1946] Ch. 57, 62, 63.

"written forms, or otherwise howsoever." That definition would obviously include the football pool betting transactions with which we are concerned in this case.

Section 14 of the Finance Act, 1948, increased the betting tax on pool betting. Sub-section 2 of that section provided: "Subject to the provisions of this section, bets shall be "deemed for the purposes of the said s. 6 and of the Fifth "Schedule to the said Act to be made by way of pool betting "whenever a number of persons make bets on terms that the "winnings of such of those persons as are winners shall be, "or shall include, an amount (not determined by reference "to the stake-money paid or agreed to be paid by those persons) "which is divisible in any proportions among such of those "persons as are winners. Nothing in this sub-section shall "be construed as restricting the definition of pool betting "contained in sub-s. 5 of the said s. 6 as originally enacted."

It is true to say that those Acts were both passed subsequently to the judgment given by Lord Greene M.R. in *Elderton* v. *United Kingdom Totalisator Co. Ld.* (1), and it is possible to suggest that that was the reason why they were passed. In my opinion, if those words were put in for that reason, they were put in for the purpose of making clear the meaning of the term which Parliament had already used in the Act of 1934; and that confirms me in the view that "pool "betting" as used in the Act of 1934 was intended by the legislature to refer to transactions of the nature which we are considering in the present case. For that reason I agree with my Lord that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Wilkinson, Howlett and Moorhouse; Solicitor, Metropolitan Police.*

(1) [1946] Ch. 57.

R. P. C.

KEEBLE *v.* MILLER.

1950
Jan. 20.

Lord Goddard C.J. and Lynskey J.

Road traffic—Motor vehicles—Classification—Heavy motor car or light locomotive—Vehicles not "constructed" themselves to carry any load—Meaning—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 2, *sub-ss.* 1 (*b*) *and* (*d*), 4 (*b*), *s.* 18, *sub-ss.* 1 *and* 3.

By s. 2, sub-s. 1, of the Road Traffic Act, 1930: "Motor "vehicles shall . . . . be divided into the following classes:— ". . . . (*b*) Light locomotives; that is to say, mechanically "propelled vehicles which are not constructed themselves to "carry any load (other than [water, fuel, accumulators and "other equipment used for the purpose of propulsion, loose tools "and loose equipment]) and the weight of which unladen "does not exceed eleven tons and a half, but does exceed seven "tons and a quarter . . . ."

"Constructed" in s. 2, sub-s. 1, of the Road Traffic Act, 1930, means constructed at any material time regardless of the vehicle's original construction. A vehicle initially built as a heavy motor car may become a light locomotive if by virtue of a subsequent reconstruction it ceases to be a vehicle constructed itself to carry any load.

A motor vehicle which had formerly been an Army lorry and which weighed 7½ tons was stopped by the police when towing three trailers. A diesel dynamo-lighting plant driven by a diesel engine was installed in the back of the vehicle. The defendant having been charged with using to draw three trailers, as permitted to a "light locomotive," a vehicle alleged to be a heavy motor-car, which might draw only one, contrary to s. 18, sub-s. 3, of the Road Traffic Act, 1930, the magistrate had regard to the original construction of the vehicle as a lorry and to the fact that the dynamo-lighting plant left sufficient space over for the carrying of a load, and accordingly convicted the defendant.

Held, that the relevant time at which the construction of the vehicle must be tested was that at which the alleged offence was committed; that the fact that the presence of the dynamo-lighting plant was not such as to preclude the carrying of a load was not a test of whether the vehicle was constructed itself to carry a load; and that the case must be remitted for the magistrate to reconsider that question on an inspection of the vehicle and with its dimensions before him.

CASE STATED by the metropolitan magistrate sitting at Thames Magistrate's Court.

An information was preferred before the magistrate against the defendant Keeble, alleging that he, on April 27, 1949, at East India Dock Road, Poplar, caused a motor vehicle, namely a heavy motor-car, to be on a highway drawing two trailers in excess of the number prescribed to be drawn by that class

[Reported by Miss S. Cobon, Barrister-at-Law.]

of vehicle, contrary to s. 18, sub-ss. 1 and 3 of the Road Traffic Act, 1930 (1).

On the hearing of the information the following facts were proved or admitted: the defendant, a travelling showman, was the owner and driver of the motor vehicle, which weighed seven and a half tons unladen and was at the material time drawing three trailers on the highway. It was a converted army lorry and carried no load other than a diesel dynamo-lighting plant, which was secured to it, and loose equipment for the vehicle. The defendant used that plant for giving light at his shows. There was evidence that diesel oil to drive the plant, and planks and poles to run the diesel oil up into the vehicle, were carried, and that there was room for other loads.

It was contended for the prosecutor that, since the vehicle was constructed to carry a load, it was a "heavy motor-car" within the definition contained in s. 2, sub-s. 1 (*d*) of the Road Traffic Act, 1930; and that accordingly the number of trailers which it might draw was limited to one by s. 18, sub-s. 1 (*c*) of that Act.

The defendant contended that, in view of the facts found and the provisions of s. 2, sub-s. 4 (*b*) of the Act of 1930, his vehicle was not a "heavy motor-car" but was a "light "locomotive" as defined in s. 2, sub-s. 1 (*b*); that the word "constructed" in that section referred to the construction of the vehicle at the time when its classification arose for consideration regardless of its original construction; and that accordingly he had committed no offence since a light locomotive was entitled to draw three trailers.

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(1) Road Traffic Act, 1930, s. 2, sub-s. 1: "Motor vehicles "shall . . . . be divided into the "following classes: . . . . (*b*) Light "locomotives; that is to say, "mechanically propelled vehicles "which are not constructed them"selves to carry any load (other "than [water, fuel, accumulators "and other equipment used for "the purpose of propulsion, loose "tools and loose equipment]) "and the weight of which unladen "does not exceed eleven tons and "a half, but does exceed seven "tons and a quarter: . . . (d) "Heavy motor cars; that is to "say, mechanically propelled "vehicles (not being vehicles "classified under this section as "motor cars) which are con"structed themselves to carry a "load or passengers, and the "weight of which unladen exceeds "two tons and a half:"

Sub-section 4: "For the pur"poses of this Part of this Act "(*b*) in the case of a motor vehicle "fitted with a crane, dynamo ". . . . or other special appliance "or apparatus which is a per"manent or essentially permanent "fixture, the appliance or appar"atus shall not be deemed to "constitute a load, but shall be "deemed to form part of the "vehicle."

Section 18, sub-s. 1: "The "number of trailers . . . . which "may be drawn by a motor "vehicle on a highway shall not "exceed—(*a*) in the case of a ". . . . light locomotive, three; ". . . . (*c*) in the case of a . . . . "heavy motor car, one."

Sub-section 3: "If any person "causes or permits a trailer to "be drawn in contravention of "this section, he shall be guilty "of an offence."

The magistrate held that the word "constructed" in the definition of a light locomotive in s. 2, sub-s. 1 (*b*) of the Act of 1930 meant "originally constructed"; that the adaptation of the vehicle to carry the diesel dynamo-lighting plant was not such as to preclude the carrying of other loads; that the poles, planks and diesel oil carried were not permanent or essentially permanent parts of the vehicle within the meaning of s. 2, sub-s. 4 (*b*) of the Act; and that the vehicle was therefore a "heavy motor-car." He accordingly found the offence proved and fined the defendant fifty shillings.

The defendant appealed.

Raeburn K.C. and *Harris Walker* for the defendant. This vehicle was at the time of the alleged offence a light locomotive within the meaning of s. 2, sub-s. 1 (*b*) of the Road Traffic Act, 1930. The magistrate misdirected himself by assuming that he had to look at its original construction, but the right test is whether it was constructed to carry a load at the material time. *Hubbard* v. *Messenger* (1) is distinguishable. That was a case of exceeding the speed limit, and the material words were "constructed or adapted"; and because of the use of the word "adapted" the court held that "constructed" meant "originally constructed."

The mere fact that a vehicle can be used for a certain purpose does not necessarily mean that it was constructed for that purpose: *Cook* v. *Hobbs* (2). So here the fact that there is room for a load does not make the vehicle one constructed to carry loads. This vehicle carried nothing in or on it which was not a part of it; the loose equipment carried on this vehicle comes within the excepted class of articles in s. 2, sub-s. 1 (*a*); and the diesel engine does not constitute a load. The only question is what its construction indicates that it is intended for. According to its construction at the material time a vehicle can be a heavy motor-car or a light locomotive. As an army lorry this vehicle would have been a heavy motor-car;

(1) [1938] 1 K. B. 300. (2) [1911] 1 K. B. 14.

but the fitting of the diesel engine was a new construction, and the vehicle thereafter was a light locomotive, the diesel plant becoming part of it, after which it was no longer constructed to carry a load. The magistrate misapplied the law, as he considered that "constructed" meant "originally constructed," and in his findings he referred to "adaptation" and not "construction."

Vernon Gattie for the prosecution. The only point here is whether this vehicle was constructed to carry a load. That question, provided that he interpreted the law correctly, was one of fact for the magistrate. He found that it was originally an army lorry and therefore constructed to carry a load; that it was converted by the fitting of a diesel engine and at the time of the offence had room for other loads; and that it carried certain apparatus in connexion with the diesel engine. By his finding that there was room for other loads, that is, other than the diesel plant, the magistrate must be taken to have found that the vehicle was constructed for the purpose of carrying other loads also at the time when the defendant was stopped.

LYNSKEY J. [referred to s. 2, sub-s. 1, of the Road Traffic Act, 1930, and to the facts, and continued:] The result of s. 2, sub-s. 4 (*b*) of the Act of 1930 is that, when this vehicle was fitted with this diesel engine and plant, that apparatus became part of the vehicle and not part of the load which it had to carry. The magistrate found that the vehicle had no load other than a diesel dynamo-lighting plant, which was an apparatus secured to it, loose equipment for the vehicle, diesel oil to drive the dynamo-lighting plant, and planks and poles for running barrels of diesel oil up into the lorry. Each of those articles would come within the list set out in s. 2, sub-s. 1 (*a*), that is to say "water, fuel, accumulators and "other equipment used for the purpose of propulsion, loose "tools and loose equipment."

The magistrate found that there was evidence that there was room for other loads when the vehicle was fitted with this diesel engine, but he did not find that it was constructed to carry other loads. It was his opinion that the word "constructed" in the definition of a light locomotive in s. 2, sub-s. 1 (*b*) of the Act of 1930 meant "originally "constructed," and he apparently considered the case from the point of view that this vehicle had been originally constructed as an army motor lorry. In my view, "constructed" in that Act means constructed at any material time. The fact that originally a vehicle was constructed as a heavy motor-car will not operate to prevent its being a light locomotive if thereafter a reconstruction takes place; and, after such a reconstruction as the fitting of an appliance like a diesel engine or a crane, it may cease to be a vehicle constructed for the purpose of carrying loads and become, by virtue of s. 2, sub-s. 4 (*b*), a light locomotive as being a vehicle fitted with a special appliance.

In considering the meaning of the word "constructed" the magistrate ought to apply his mind to the question whether, at the time when this offence was alleged to be committed, the vehicle was constructed for the purpose of carrying loads, in which event it would be a heavy motor-car; or whether, in view of the appliance which was fixed to it, it was not constructed for carrying loads, and was therefore a light locomotive and entitled to draw three trailers.

The magistrate also said that the adaptation of the vehicle to carry the dynamo-lighting set was not such as to preclude the carrying of other loads. That, again, in my view, is not the true test to apply. In order to decide this case satisfactorily, the magistrate ought to see the vehicle and have its dimensions put before him, and then ask himself the question: is that vehicle in that condition constructed to carry a load or passengers, apart from the driver and his mate? If, on his view of the vehicle and its dimensions, he is of opinion that, although a diesel engine has been fitted to it, it is still a vehicle constructed to carry loads in addition to the fitment of the diesel engine which is part of the vehicle, his conviction in this case will be right. But if, having seen it, he cannot come to the conclusion that the vehicle in its condition at the time of the alleged offence was constructed for the purpose of carrying loads, he ought to dismiss the information.

Another matter determined by the magistrate was that the poles, planks and diesel oil which were carried were not permanent or essentially permanent parts of the vehicle. It is not suggested that they were, and it is not necessary here to decide whether they were or not. If they were not permanent parts of this vehicle, the poles, planks and diesel oil were probably "water, fuel, accumulators, and other equipment used for the purpose of propulsion, loose tools and loose

1950

KEEBLE
v.
MILLER.

Lynskey J.

"equipment," and if that were so, they would not rank as a load. But that is a matter for the magistrate.

In my view the magistrate has not asked himself the correct set of questions or directed his mind to the proper construction of this Act. This case must go back to him so that he can consider the matter on that basis of construction and decide whether this vehicle, in its condition when stopped, was a vehicle constructed for the purpose of carrying loads.

LORD GODDARD C.J. I agree.

Appeal allowed.
Case remitted.

Solicitors: *Woodman, Matthews & Co.; The Solicitor, Metropolitan Police.*

C. C. A.

1950
Jan. 23.

Lord Goddard C.J., Byrne and Morris JJ.

REX *v.* REYNOLDS.

Criminal law—Assault on young girl—Child witness—Capacity to take oath—Evidence of mentality given in jury's absence—Irregularity—Conviction—Validity.

At the trial of the appellant on a charge of indecently assaulting a girl eleven years of age a discussion took place between the Chairman of Sessions and counsel as to the child's capacity to give evidence on oath. During the discussion, by direction of the chairman, the jury left the court. In their absence, a school-attendance officer was called as a witness and gave evidence as to the class of school attended by the child, the quality of the home from which she came and her standard of education. After the witness had been examined and cross-examined the jury returned to court, and the child was sworn as a witness and gave evidence on oath. The appellant was found guilty.

Held, that, inasmuch as in a criminal trial it should be regarded as most exceptional that any evidence should be given otherwise than in the presence of the jury, the hearing of the evidence of the school-attendance officer when the jury were absent constituted such an irregularity that the conviction could not stand.

APPEAL against conviction.

The appellant, Ernest Albert Reynolds, was indicted at Hertfordshire quarter sessions on a charge of indecently assaulting a girl eleven years of age. At the trial the question arose whether the complainant, who was being educated at a school for children of retarded development, understood the nature of an oath and, accordingly, was therefore capable of giving sworn evidence. A discussion took place between the chairman and counsel, the details of which are set out in the judgment, and, after the chairman had asked the child a number of questions with a view to ascertaining her mental capacity, counsel for the appellant said that he had certain submissions to make, and it was agreed that the child should leave the court. The clerk of the peace then asked whether counsel for the appellant desired that the jury should be present while he made his submissions. The chairman said that the question whether the child was capable of taking the oath was entirely one for him, but that he was willing to listen to any submissions which counsel desired to make. He thought, however, that the jury should not be present The jury then retired, and a school-attendance officer was called who had considerable knowledge of the child and was familiar with the school which she attended, the class of home from which she came and her standard of education. Both examination and cross-examination of the witness took place in the absence of the jury. The jury having returned, the child was sworn as a witness and the trial proceeded. The appellant was found guilty, and now appealed against his conviction on various grounds not material to this report.

W. R. Rees-Davies for the appellant.
Pensotti for the prosecution.

LORD GODDARD C.J. The appellant was convicted at Hertfordshire quarter sessions of indecent assault on a child. He appeals against his conviction, and his counsel has told us the various points which he intended to take on his behalf. One of them was that he was submitting that the chairman was wrong in holding that the child should be sworn. We have not had that matter fully argued ; it is sufficient, therefore, to say that in the absence of some strong authority it would require a great deal to persuade the court to interfere if a judge or chairman has decided, after seeing the child and putting questions to it, that it did understand the nature of an oath and was therefore capable of giving sworn evidence.

Another point occurred to the court in this case which is of the greatest importance. When the chairman had asked this child a good many questions, and, it seems to me, very proper ones, Mr. Rees-Davies, for the prisoner, said: "There "was a great deal that I have to put on this matter. I do "not know whether this is a suitable moment. May I mention "these matters at this stage?" The chairman said: "I am "not sure that the child had better be here." Mr. Rees-Davies said: "I think it would be better if she withdraws. "There are matters of very great moment which I must put "here." It was quite unobjectionable to say that the child should go out of court.

Then Mr. Pensotti, for the prosecution, said to the chairman: "With respect, this is a matter entirely for you. I understand "my friend has got some submissions to make about swearing "the child." The clerk of the peace intervened at that point and said: "Do you wish the jury to be here, Mr. Rees-"Davies?" Mr. Rees-Davies said: "There are matters "which I think the jury will have to hear, whether the child "is sworn or unsworn." Mr. Pensotti said: "If my friend "is proposing to make submissions, I object, because in my "submission it is entirely a matter for you, Sir. Counsel "have no say in the matter. If you are satisfied that the "child can be sworn, then the child can be sworn." The chairman then said: "The question whether the child is "capable of taking the oath or not is entirely a question for "me. If counsel says he wishes to make submissions to me, "I am pleased to hear what they are. What I shall do with "them is another matter. The only question at the moment "is whether these submissions should be made in the absence "of the jury. I think perhaps that would be the better course. "Members of the jury, I do not know what is coming; it may "be that it is something you should not hear until after the "case. Therefore I must ask you to retire."

Evidently the clerk of the peace, in putting the question "Do "you wish the jury to be here?", was thinking of the practice which obtains in the courts that if there is a discussion on the question whether a confession is admissible or not, or has been obtained by methods which would render it inadmissible the jury are always told to retire. Obviously the reason for that is that it is almost impossible, while evidence is being taken as to the circumstances in which the confession has been obtained, to prevent the terms of the confession from coming out. The whole question at that stage is whether or not the confession can go before the jury. Therefore, the

C. C. A.

1950

REX
v.
REYNOLDS.

jury are outside the court while that question is argued, so that they cannot hear the terms of a confession which, it may be held afterwards, is not admissible.

The state of affairs in the present case is entirely different. After the jury had retired, a school-attendance officer was called who had had a good deal to do with this child and knew the school to which she had been sent. It was a school, not for mentally deficient children, but for those who are mentally retarded. This child evidently came from a somewhat squalid home, and her degree of education was very slight, that is, presumably, less than ordinary for a child of her age which was then 12 years—she was 11 years old at the time of the assault. The officer was called, gave evidence, and was cross-examined. His evidence occupied some three or four pages of the shorthand note. All that was done in the absence of the jury, and the question is whether that was such an irregularity that this conviction cannot be allowed to stand. In the opinion of the court it was.

In such a case as the present, what is the first thing which the chairman has to decide ? Section 38 of the Children and Young Persons Act, 1933, provides : " Where, in any proceedings against any person for any offence any child of " tender years called as a witness does not in the opinion of " the court understand the nature of an oath, his evidence " may be received, though not given upon oath, if, in the " opinion of the court, he is possessed of sufficient intelligence " to justify the reception of the evidence, and understands " the duty of speaking the truth." So, when a child is put into the witness-box, the chairman or presiding judge must first decide whether the child in his opinion understands the nature of the oath. Then he may have to go on and consider whether, if the child does not possess sufficient intelligence to understand the nature of an oath, he is possessed of sufficient intelligence to justify the reception of his unsworn evidence on the ground that he understands the duty of speaking the truth.

It is true in the present case that, if the chairman had found that the child did not understand the nature of an oath, it would have been an end of the case, because there was no other evidence against the appellant except that of the child. I quoted s. 38 to show what the duty of the presiding judge is in those circumstances : he may, as I have said, have to decide whether the child understands the nature of an oath, or, if not, whether the child is possessed of sufficient intelligence and understanding to justify the reception of his unsworn evidence, which then has to be corroborated by other evidence on oath.

In *Rex* v. *Dunne* (1), a child of seven years was put into the box to be examined on a charge of incest. The judge had the child brought round to his room in order to talk to her and to examine her to see whether she understood the nature of an oath. She afterwards gave evidence, but the Court of Criminal Appeal quashed the conviction and in their judgment said (2): "It goes without saying that what the judge did "in that matter was suggested purely by feelings of kindness "and consideration for the youthful witness. The question "for this court is, can a conviction stand after an incident "of that kind has occurred? It is admittedly an incident "without parallel. Admittedly, nobody in this court, either "from his own experience or from researches into the authorities, can adduce any parallel case. In the result, something "was said to or by this witness which was not in the hearing "or presence of the jury or of the accused. The court is "clearly of opinion that, in these circumstances, the appeal "must be allowed and the conviction quashed."

Certainly no member of the present court has ever known of a case in which a witness has been called to inform the court whether a child is capable or not of giving evidence. I am not saying that there may not be cases—perhaps this is one—in which the chairman may not want some assistance, especially if he hears that the child is at a particular sort of school. It is not on that ground that the court thinks that there has been a fatal mistake here. It is for this reason: obviously, why the court decided in *Rex* v. *Dunne* (1) that the evidence of the child must be given in the presence of the jury was that, although the duty of deciding whether the child may be sworn or not lies on the judge and is not a matter for the jury, it is most important that the jury should hear the answers which the child gives and see the demeanour of the child when she is questioned, because it will enable the jury to come to a conclusion as to the weight which they should attach to her evidence. If that was the reason why the court in *Rex* v. *Dunne* (1) held that it was essential that the evidence should be given in the presence of the jury, in this case that is so a fortiori, it seems to me, when a witness is called to assist the court by telling it what his experience may be of the child and of the character or impression that he may have formed of the child. The jury would then have all the facts before them with regard to the child's truthfulness, or reputation for truthfulness, and all the information which could be given on the question whether the child was one who would be likely to tell the truth and on whose evidence they could rely.

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(1) (1928) 21 Cr. App. R. 176. (2) Ibid. 178.

I may say—and I am sure that I do so with the concurrence of my brethren—that it should be regarded as most exceptional that any evidence should be given in a criminal trial otherwise than in the presence of the jury. As I have said, there is one well known exception to this rule which has been laid down in mercy and fairness to prisoners, namely, that any evidence with regard to whether a confession was properly made ought to be given in the absence of the jury; but the class of evidence given in the present case ought to be given in the face of the jury and in open court. On these grounds we have come to the conclusion—it may be unfortunate for many reasons—that this conviction cannot stand and must be quashed. The prisoner is discharged.

Appeal allowed.

Solicitors: *Cartwright, Cunningham & Co.; Hartley and Hine.*

P. B. D.

COPPS *v.* PAYNE.

1950
Jan. 12.

Lord Goddard C.J., Lynskey and Sellers JJ.

Railways—Level crossing—Accommodation crossing—Duty to shut gates —Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 47, 68 *and* 75.

On the true construction of ss. 47, 68 and 75 of the Railways Clauses Consolidation Act, 1845, the obligations of a railway company and other persons, respectively, with regard to a level crossing are determinable by reference to the circumstances existing at the crossing when the railway was constructed. If the railway, when constructed, passed over a public road on a level, then the company came, and remains, under the duties imposed by s. 47. On the other hand, if, when the railway was constructed, gates were erected at a given point for the accommodation of the owners and occupiers of adjoining lands, the obligations on the company were thereby discharged, and it became, and remains, the duty of those using the gates to keep them closed. A subsequent alteration in the character of the crossing caused, for example, by the conversion of an occupation road into a public highway would not impose on the railway company the duties laid down by s. 47 of the Act of 1845, or relieve those using the gates from the obligations imposed on them by s. 75.

CASE STATED by Essex justices.

At a court of summary jurisdiction held at Castle Hedingham, Essex, an information was preferred by James Edwin Copps, a constable in the Railway Executive Police, against Basil Payne, charging him with contravening s. 75 of the Railways Clauses Consolidation Act, 1845, (1) in that he omitted to shut and fasten gates, set up on either side of the railway for the accommodation of the owners or occupiers of the adjoining lands at Borley, as soon as he and the carriage under his care had passed through.

The following facts were proved or admitted at the hearing of the information. On January 26, 1948, the defendant, while in charge of a motor car, opened the gates set up on either side of the railway at Borley, omitted to shut and fasten either of them after he had passed through, and drove on

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(1) Railways Clauses Consolidation Act, 1845, s. 47: "If the "railway cross any turnpike road "or public carriage road on a "level, the company shall erect "and at all times maintain good "and sufficient gates across such "road, on each side of the railway, "where the same communicate "therewith, and shall employ "proper persons to open and shut "such gates . . . ."

Section 68: "The company "shall make and at all times "thereafter maintain the following "works for the accommodation "of the owners and occupiers of "lands adjoining the railway; "(that is to say,) such and so "many convenient gates . . . . "over, under or by the sides of "or leading to or from the railway "as shall be necessary for the "purpose of making good any "interruptions caused by the rail- "way to the use of the lands "through which the railway shall "be made; and such works "shall be made forthwith after "the part of the railway passing "over such lands shall have been "laid out or formed, or during "the formation thereof."

Section 75: "If any person "omit to shut and fasten any "gate set up at either side of the "railway, for the accommodation "of the owners or occupiers of "the adjoining lands, as soon as "he, and the carriage . . . . "under his care, have passed "through the same, he shall "forfeit for every such offence "any sum not exceeding forty "shillings."

1950

COPPS
v.
PAYNE.

to Borley Mill leaving them open. The gates were set up where a road and public footpath crossed the railway, and on each gate a notice stated that failure to close the gates entailed a penalty of 40*s.* 0*d.* The road and footpath led directly off the highway, and the road only ran to Borley Hall and Mill. The railway was built under a special Act which expressly incorporated the Railways Clauses Consolidation Act, 1845. When it was built, the road was an occupation road for the use of owners or occupiers of Borley Hall and Mill, and the gates were set up under s. 68, the crossing being an "accommodation crossing." The road was only used by vehicles owned by or having business with the owners or occupiers of Borley Hall and Mill, and the volume of traffic had not materially increased or changed in character since the railway was built. For many years, between 5.30 a.m. and 9.30 p.m., the gates had been opened and closed on weekdays by employees of the railway company, but the practice ceased in 1929. From 1930 onwards the repair and maintenance of the road was the responsibility of the highway authority. The railway was now vested in the Railway Executive.

It was contended for the prosecutor that the gates were erected for the accommodation of the owners or occupiers of the adjoining lands, and that, as the defendant had omitted to shut them, he was guilty of the offence with which he was charged.

For the defendant it was contended that, as the predecessors of the Railway Executive had until 1929 employed persons to open and close the gates, and as the roads on either side of the railway were public highways on January 26, 1948, the gates were not on that date gates for the accommodation of the owners or occupiers of adjoining lands.

The justices were of opinion that the contentions of the defendant were right, and dismissed the information.

The prosecutor appealed.

T. F. Southall for the prosecutor. The duties of statutory undertakings are provided for by statute. The Railways Clauses Consolidation Act, 1845, mentions two types of crossing. Section 47 refers to railways crossing a turnpike. Section 68 imposes a duty on a railway company to provide convenient gates in connexion with accommodation crossings. The time by reference to which the nature of a crossing is determined is that at which the railway was built. [*Rhondda and Swansea Ry. Co.* v. *Talbot* (1) and *Attorney-General* v. *Great Northern Ry. Co.* (2), referred to.]

Hines for the defendant. When the railway was first built the crossing was an accommodation crossing; but it was not so at the time of the alleged offence. If it can be shown that the status of the crossing has thus changed since its construction, then a duty has become imposed on the railway company to maintain the gates and employ proper persons to open and shut them, in accordance with s. 47 of the Act. At the material time this was a public road; it had been repaired by the inhabitants at large; and before 1929 the company, as was their duty, had provided men to open and close the gates. The cases referred to for the prosecutor are not authorities for the proposition that the character of a crossing cannot change. If s. 75 were to apply to what has become a public crossing it would mean that only those people for whom the accommodation gates had been erected would be under a duty to shut them, whereas in respect of all others the duty would be on the railway company. Section 75 can have no application to a crossing to which s. 47 applies, and the character of this crossing had changed from that of an accommodation crossing to that of a level crossing over a public highway.

LORD GODDARD C.J. The question is whether there is a duty on the railway executive to provide someone to shut and fasten the gates at this particular level crossing or whether they must be shut by the persons using them. In my opinion, it is clear that the latter is the correct interpretation of the Act.

[His Lordship stated the facts, read the relevant sections, and continued:] Mr. Hines has not argued that the fact that the railway company did for some time provide men to open and close the gates can make any difference in law. He has argued that, as the road has become repairable by the inhabitants at large, and therefore is a public road which the railway crosses, the obligation is on the company to provide servants to open and shut the gates under s. 47 and the obligation on the persons using the road under s. 75 no longer exists. In my opinion that argument is not sound.

The question turns entirely on these few sections, and it seems to me quite clear that the court must look at what

(1) [1897] 2 Ch. 131.

(2) [1916] 2 A. C. 356, 380.

happened when the gates were erected. If the railway, when it was constructed, crossed a public road, then the company had not only to erect the gates but also to maintain them. If, at the time when the line was made, the crossing was made for the accommodation of persons living in the neighbourhood of the line, the obligation on the company was to set up gates and the obligation as regards opening and closing them was on the persons using them. I can find nothing in the Act to suggest that an alteration in the character of the road in question will alter the obligation which was imposed at the time when the line was constructed and the gates were erected. That obligation remains, it seems to me, for all time, so long as the gates are there.

My brother Lynskey called attention during the course of the argument to a passage in Lord Sumner's speech in *Attorney-General* v. *Great Northern Ry. Co.* (1), concerning bridges, in which he points out that the sections take no account, as he puts it, of dis-turnpiking the road. In other words, no change in the character of the road makes any difference with regard to the respective obligations of the railway company and the public; and so, exactly, I think, is the case here.

For these reasons I think that the justices came to a wrong decision; and the case must go back to them with a direction to convict. Obviously, this is more or less in the nature of a test case, because the question is whether for the future the Railway Executive have to provide persons to open and shut these gates. The answer is that in the opinion of the court the Executive are not under any obligation to do so, and that the obligation of closing the gates is on the persons using them.

Lynskey J. [read ss. 68 and 75, referred to the facts, and continued :] Here there is a finding of fact by the justices, and no suggestion that there was not evidence on which they could so find, that the crossing was set up for the accommodation of owners or occupiers of adjoining land: it is a crossing within the exact words of s. 75.

The only argument for the defence is that this road has now become a public highway and that the effect of that is to impose on the railway company the obligation created by s. 47. The title of the Railways Clauses Consolidation

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(1) [1916] 2 A. C. 356, 380.

1950

Copps v. Payne.

Lynskey J.

Act, 1845, shews what are its objects. It is entitled: "An "Act for consolidating in one Act certain provisions usually "inserted in Acts authorising the making of railways." The whole object of the Act was to provide clauses which would be incorporated in private Acts enabling the various undertakers to form and erect their railways; and in my view s. 47 must be read in the light of that intention. The section provides: "If the railway cross any turnpike road or public "carriage road on a level, the company shall erect and at all "times maintain good and sufficient gates across such "road . . . ." The time at which that obligation has to be fulfilled by the company is that of the construction of the railway. No obligation is imposed on them at any future time when what is an ordinary occupation road becomes a public highway. In my view, therefore, this case must go back to the justices with a direction to convict.

Sellers J. I agree. When this crossing was made and the gates were set up, there was, by reason of s. 75, an obligation on the part of persons using it to close the gates after them. I can find nothing which has removed that obligation, and in my view it persists. I agree with the order proposed.

Appeal allowed.

Solicitors: *E. Coleby; F. G. Perks, for Bates, Wells & Braithwaite, Sudbury.*

L. F. J. McD.

C. A.

CHARLES RICKARDS LD. v. OPPENHAIM.

1950

Jan. 12, 13 and 16.

Bucknill, Singleton and Denning L.JJ.

Contract—Sale of goods or work and labour done—Time of essence—Expiry of time—Waiver by purchaser—Subsequent notice requiring completion in reasonable time—Time again of the essence.

Where, as a condition of its performance, time is of the essence of a contract for the sale of goods and, on the lapse of the stipulated time, the buyer continues to press for delivery, thus waiving his right to cancel the contract, he has a right to give notice fixing a reasonable time for delivery, thus making time again of the essence of the contract, which, if not fulfilled by the new time stipulated, he will then have the right to cancel. The reasonableness of the time fixed by the notice must be judged as at the date when it is given.

Hartley v. *Hymans* [1920] 3 K. B. 475, 494–5, and *Crawford* v. *Toogood* (1879) 13 Ch. D. 153, followed.

In similar circumstances, in the case of a contract for work and labour done, the person who has ordered the work can give a valid notice to the contractor making time again of the essence of the contract.

Per Denning L.J. Where, in such cases, the buyer or the person who has ordered the work continues, when the time originally fixed, being of the essence of the contract, has elapsed, to press for delivery or completion, thus leading the obligee to believe that he will not insist on the stipulation as to the time of performance and that if delivery is made or the work completed he will accept it, he cannot afterwards set up the original condition as to time. But whether it be called waiver or forbearance on his part, or an agreed variation, or substituted performance, matters not. It is a kind of estoppel, since by his conduct the purchaser or person ordering has evinced an intention to affect their legal relations. He has made, in effect, a promise not to insist on his strict legal rights. The promise in such a case is binding, since it is intended to be, and is in fact, acted upon.

Bruner v. *Moore* [1904] 1 Ch. 305; *Panoutsos* v. *Raymond Hadley Corporation of New York* [1917] 2 K. B. 473; and *Central London Property Trust Ld.* v. *High Trees House Ld.* [1947] K. B. 130, referred to.

APPEAL from Finnemore J.

Early in 1947, the defendant Oppenheim ordered from the plaintiffs, Charles Rickards Ld., motor-car traders, a Rolls Royce Silver Wraith chassis which was delivered on July 30, 1947. The defendant wanted a body built on the chassis. On inquiry by the plaintiffs, at the instance of the defendant, one company estimated the time for this work at 21 months, and another company at 15 months. A third company of coachbuilders called Jones Brothers (Coach Builders) Ld., said that they could do the work " within six or, at the most, " seven months." The defendant gave the order for the work to the plaintiffs on July 11, 1947, on that footing, and they sub-contracted with those coachbuilders to do the work. On August 7, 1947, the plaintiffs wrote to the coachbuilders that it was in order for them to accept any instructions with regard to the body that were given by the defendant, and asking that company to keep them, the plaintiffs, au fait with the situation. The specification for the bodywork was not finally agreed until August 20, 1947. If time were taken as running from that date, the time for delivery was, at latest, March 20, 1948.

On that date the work was not completed. The defendant did not cancel the contract, but continued to press for delivery of the finished car, and so waived the provision as to time, "delivery within six or at most seven months." The defendant asked for delivery of the car in time for Ascot, 1948, but he did not get it. Wishing to take the car abroad at the beginning of August, the defendant on June 28, 1948, saw the manager of the coachbuilders, who told him that the car would be ready in two weeks' time. On June 29, 1948, the defendant wrote to the coachbuilders, "for the attention "of the managing director." He referred to his conversation with the manager and continued: "I regret that I shall be "unable, unless my plans change, to accept delivery of the "Rolls you are making for me after July 25. For six months "I have had a reservation to take a car abroad on August 3 "for my holiday and it would appear to me to be impossible "to alter this date. I shall, therefore, have to buy another "car."

The coachbuilders did not send that letter on to the plaintiffs for eight or nine days. On July 8, 1948, their manager informed the defendant that the car would not be ready by July 25, 1948. Thereupon the defendant bought another car and claimed from the plaintiffs 2,041*l.*, the sum which he had paid to them for the chassis, leaving them to sell the car, when completed, for their own account. On July 10 there was a meeting between the defendant and a director and the sales manager, representing the plaintiff company, at which it was subsequently suggested that the defendant had waived his cancellation of the contract. On July 16, the plaintiffs wrote to the defendant: "In view of your "comments during our conversation on this subject last "week, we assume that you are prepared to leave the order "with [the coachbuilders] until your return from holiday, "by which time the car should be ready for delivery. Every "effort will be made on our part to expedite delivery and we "feel sure you appreciate our desire to settle this matter "amicably." The defendant did not reply to this letter. The car was completed on October 18, 1948, but the defendant refused to accept delivery of it.

The plaintiffs claimed from the defendant 4,530*l.*, the balance of the price of the car bargained and sold to the defendant, or, alternatively, the like sum for work and labour done and materials supplied to the defendant in connexion with the bodywork for the defendant's chassis. The defendant counterclaimed for the chassis or its value. The coachbuilders' manager said in his evidence that they were constantly making promises to the defendant about the completion of the work, which they were unable to keep because of the difficulties met with in regard to labour and materials.

Finnemore J., to whom *Anglo-Egyptian Navigation Co.* v. *Rennie* (1), , and Benjamin on Sale (7th ed.) at p. 178 were cited, held (*a*) that the contract between the defendant and the plaintiffs was for the sale of goods and not one for work and labour done and materials supplied ; (*b*) that time was of the essence of the contract, which provided that the car should be delivered completed at the latest in seven months ; (*c*) that that condition was waived by the defendant ; (*d*) that by his letter of June 29, 1948, the defendant again made time of the essence of the contract, specifying a time for its completion which was reasonable (see *Hartley* v. *Hymans* (2), the judgment of Bailhache J. in *Dudley, Clarke & Hall* v. *Cooper, Ewing & Co.* (3), *Jones* v. *Gibbons* (4) and Leake on Contracts (8th ed.) at p. 652) ; (*e*) that the defendant at the interview on July 10, 1948, did not waive the condition that the car must be delivered completed by July 25, 1948 ; and (*f*) that, as the work on the car had not been completed by July 25, the defendant was entitled to cancel the contracts. Accordingly he gave judgment for the defendant on both the claim and the counterclaim.

The plaintiffs appealed.

Eric Sachs K.C. and *Elliot Gorst* for the plaintiffs (who did not contest (*b*) and (*c*), but contested the other conclusions of the trial judge). The stipulated time of seven months for the completion of this contract was exceeded by the plaintiffs, but the stipulation was waived by the conduct of the defendant who did not take advantage of his right then to cancel the contract, but merely continued to press for the completion of the work. The defendant was estopped by his conduct from subsequently cancelling the contract. Thereupon the only obligation of the plaintiffs was to complete the work within a reasonable time, and that means in the circumstances as they existed. Causes of delay outside the control of the plaintiffs, such as the difficulty of obtaining labour and materials, could not prevent the plaintiffs from completing the work within a reasonable time. As Lord Watson said in *Hick* v. *Raymond and Reid* (1), where the law implies that a contract shall be performed within a reasonable time, it has " invariably been held to mean that the party upon whom " it is incumbent duly fulfils his obligation, notwithstanding " protracted delay, so long as such delay is attributable to " causes beyond his control and he has neither acted negligently " nor unreasonably." That, it is submitted, was the case here.

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(1) (1875) L. R. 10 C. P. 271.
(2) [1920] 3 K. B. 475.
(3) Unreported July 9, 10, 11, 14, 1919 : see [1920] 3 K. B. at pp. 487–9.
(4) (1853) 8 Ex. 920.

The question arises, then, whether the defendant's letter of June 29, 1948, threatening to cancel the contract if the work were not completed by July 25, 1948, again made time of the essence of the contract. In certain circumstances there is such a rule in the case of a contract for the sale of goods: *Hartley* v. *Hymans* (2). But there is no such rule in the case of a contract for work and labour done and materials supplied. There is no authority to that effect. The rule has its origin in contracts for the sale of land, and the rule has been extended to the case of sale of goods. To extend this rule to contracts for work and labour done would be to embrace a wide range of contracts and might enable those who have made contracts involving great expenditure to avoid them owing to a minor delay in performance.

Once a provision for completion within a fixed time has been waived, all the cases of contracts for the sale of land show that, before a buyer can give a notice making time again of the essence of the contract, it must be established that there has been waste of time by the seller, as distinguished from the mere lapse of time, which may well be due to causes beyond the seller's control. When time was not originally of the essence of a contract for the sale of land, one of the parties is not entitled afterwards by notice to make it of the essence unless there has been some default or unreasonable delay by the other party: *Green* v. *Sevin* (3), per Fry L.J. (4). Before there has been a waste of time, there is nothing which can be the subject of a notice.

Again, in a contract where such a notice can be given, the notice must be given for a reasonable time during which the

(1) [1893] A. C. 22, 32, 33.
(2) [1920] 3 K. B. 475.
(3) (1879) 13 Ch. D. 589.
(4) Ibid. 599.

C. A.
1950

CHARLES RICKARDS LD.
v.
OPPENHAIM.

seller can complete; i.e., it must be such time as will be practicable, that is, will afford him the opportunity to complete: he must be afforded the requisite time to enable him to do so. *Stickney* v. *Keeble* (1). Such a notice making time of the essence of the contract must be judged as at the date when the notice is received: *Crawford* v. *Toogood* (2). The reasonable notice must give sufficient time for the work then outstanding to be completed.

The decision of the Divisional Court in *Dakin & Co. Ld.* v. *Lee* (3) was that, where a builder has supplied work and labour for the erection or repair of a house under a lump-sum contract, but has departed from the terms of the contract, he is entitled to recover for his services unless (1.) the work that he has done has been of no benefit to the owner; (2.) the work done is entirely different from the work which he has contracted to do; or (3.) he has abandoned the work and left it unfinished. The decision of the Court of Appeal in that case proceeded on different grounds.

[Counsel then contended on the evidence: (1.) that the plaintiffs' delay was not due to causes within their control; (2.) that there had been no waste of time by them; (3.) that it was not shown that the condition of the work accomplished by July 8, 1948, when the notice sent to Jones Brothers Ld. on June 29, 1948, reached the plaintiffs, was such that it could be completed by July 25; (4.) that the proposition to finish the work by that date was impracticable and, therefore, that the notice was in its terms unreasonable; and (5.) that in fact the notice of June 25 was waived by the defendant, when he met the plaintiffs' representatives on July 10, 1948, as appeared from the letter of the plaintiffs to the defendant dated July 16, 1948.]

Levy K.C. and *Neville Faulks* for the defendant, were not called on to argue.

BUCKNILL L.J. I will ask Denning L.J. to give the first judgment.

DENNING L.J. It is clear on the finding of the trial judge that there was an initial stipulation making time of the essence of the contract between the plaintiffs and the defendant: the body of the car was to be completed "within six, or, at the

(1) [1915] A. C. 386.
(2) (1879) 13 Ch. D. 153.
(3) [1916] 1 K. B. 566.

"most, seven months." Mr. Sachs did not seek to disturb that finding; indeed, he could not successfully have done so. But what he did say was that that stipulated time was waived. His argument was that, the stipulated time having been waived, the time became at large, and that thereupon the only obligation of the plaintiffs was to deliver within a reasonable time. He said that "a reasonable time" meant, in accordance with well-known authorities, a reasonable time in the circumstances as they actually existed, that is, that the plaintiffs would not exceed a reasonable time if they were prevented from delivering by causes outside their control, such as strikes or the impossibility of getting parts, and events of that kind; and that on the evidence in this case it could not be said that a reasonable time was in that sense exceeded. He cited the well-known words of Lord Watson in *Hick* v. *Raymond and Reid* (1), that where the law implies that a contract shall be performed within a reasonable time, it had "invariably "been held to mean that the party upon whom it is incumbent "duly fulfils his obligation, notwithstanding protracted delay, "so long as such delay is attributable to causes beyond his "control and he has neither acted negligently nor unreasonably." These words, he said, supported the view that in this case, on the evidence, a reasonable time had not been exceeded.

If this had been originally a contract without any stipulation as to time and, therefore, with only the implication of reasonable time, it may be that the plaintiffs could have said that they had fulfilled the contract; but in my opinion the case is very different when there was an initial contract, making time of the essence of the contract: "within six or at the most, seven "months." I agree that that initial time was waived by reason of the requests that the defendant made after March, 1948, for delivery; and that, if delivery had been tendered in compliance with those requests, the defendant could not have refused to accept the coach-body. Suppose, for instance, that delivery had been tendered in April, May, or June, 1948: the defendant would have had no answer. It would be true that the plaintiffs could not aver and prove they were ready and willing to deliver in accordance with the original contract. They would have had, in effect, to rely on the waiver almost as a cause of action. At one time there would have been theoretical difficulties about their doing that. It would have been said that there was no consideration; or, if the contract

(1) [1893] A. C. 22, 32, 33.

was for the sale of goods, that there was nothing in writing to support the variation. There is the well-known case of *Plevins* v. *Downing* (1), coupled with what was said in *Bessler, Waechter, Glover & Co.* v. *South Derwent Coal Co. Ld.* (2), which gave rise to a good deal of difficulty on that score; but all those difficulties are swept away now. If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it. I think not only that that follows from *Panoutsos* v. *Raymond Hadley Corporation of New York* (3), a decision of this court, but that it was also anticipated in *Bruner* v. *Moore* (4). It is a particular application of the principle which I endeavoured to state in *Central London Property Trust Ld.* v. *High Trees House Ld.* (5).

So, if the matter had stopped there, the plaintiffs could have said, notwithstanding that more than seven months had elapsed, that the defendant was bound to accept; but the matter did not stop there, because delivery was not given in compliance with the requests of the defendant. Time and time again the defendant pressed for delivery, time and time again he was assured he would have early delivery; but he never got satisfaction; and eventually at the end of June he gave notice saying that, unless the car were delivered by July 25, 1948, he would not accept it.

The question thus arises whether he was entitled to give such a notice, making time of the essence, and that is the question that Mr. Sachs has argued before us. He agrees that, if this were a contract for the sale of goods, the defendant could give such a notice. He accepted the statement of McCardie J., in *Hartley* v. *Hymans* (6), as accurately stating the law in regard to the sale of goods, but he said that that did not apply to contracts for work and labour.

(1) (1876) 1 C. P. D. 220.
(2) [1938] 1 K. B. 408.
(3) [1917] 2 K. B. 473.
(4) [1904] 1 Ch. 305.
(5) [1947] K. B. 130.
(6) [1920] 3 K. B. 474, 494–5.

He said that no notice making time of the essence could be given in regard to contracts for work and labour. The judge thought that it was a contract for the sale of goods. But in my view it is unnecessary to determine whether it was a contract for the sale of goods or a contract for work and labour, because, whatever it was, the defendant was entitled to give a notice bringing the matter to a head. It would be most unreasonable if the defendant, having been lenient and waived the initial expressed time, should, by so doing, have prevented himself from ever thereafter insisting on reasonably quick delivery. In my judgment he was entitled to give a reasonable notice making time of the essence of the matter. Adequate protection to the suppliers is given by the requirement that the notice should be reasonable.

So the next question is: was this a reasonable notice? Mr. Sachs argued that it was not. He said that a reasonable notice must give sufficient time for the work, then outstanding, to be completed. He says that, on the evidence in this case, four weeks was not a reasonable time because it would, and did in fact, require three and a half months to complete it. In my opinion, however, the words of Lord Parker in *Stickney* v. *Keeble* (1) apply to such a case as the present just as much as they do to a contract for the sale of land. He said that " in " considering whether the time so limited is a reasonable " time the court will consider all the circumstances of the case. " No doubt what remains to be done at the date of the notice " is of importance, but it is by no means the only relevant fact. " The fact that the purchaser has continually been pressing " for completion, or has before given similar notices which he " has waived, or that it is specially important to him to obtain " early completion, are equally relevant facts "—to which I would add, in the present case, the fact that the original contract made time of the essence of the contract. In this particular case, not only did the defendant press continually for delivery, not only was he given promises of speedy delivery, but on the very day before he gave this notice he was told by the works manager in charge of the work that it would be ready within two weeks. Then he gave a four weeks' notice. The judge found that it was a reasonable notice, and, in my judgment, there is no ground on which this court could in any way differ from that finding. The reasonableness of the time fixed by the notice must, of course, be judged at the time at which it is given. It cannot be held to be a bad notice because, after it is given, the suppliers find themselves in unanticipated difficulties in making delivery.

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(1) [1915] A. C. 386, 419.

So here the notice was a perfectly good notice so as to make time of the essence of the contract, subject, however, to another point that Mr. Sachs made: he said it was bad because it was not given to the plaintiffs directly but was given to the coachbuilders, the sub-contractors, and it would appear that they did not send it on to the plaintiffs for another eight or nine days. The answer to that argument is that the notice was given to the people who were actually doing the work, and that the plaintiffs had, from the beginning, authorized the defendant to give instructions direct to them. This notice was, no doubt, important,and it would have been better for the defendant to have given it both to the plaintiffs and to the coachbuilders; but it seems to me that, in view of the authorization given on August 7, 1947, it cannot be that that made it a bad notice. In any event the plaintiffs got it within eight or nine days; and, even if it was only received then, still there was more than a fortnight to go before July 25, and it would still be a reasonable notice. That point also, therefore, does not hold good.

There was yet one remaining point: Mr. Sachs said that, even accepting the notice of June 29 as one making time of the essence of the contract, nevertheless even that notice was afterwards waived by the defendant. On July 10, 1948, there was a discussion between the defendant on the one hand and the plaintiffs' representatives on the other as to what was to be done about the car. They said that the defendant authorized the plaintiffs to go ahead with the work, and promised to take delivery of the car after he came back from his holiday and then to decide whether they should sell it for him; whereas the defendant said that he only offered to do what he could to help them, and that he suggested their best course was to go on and complete it and sell it on their own account, not on his behalf, but in order to save any loss. The judge took the view that the defendants' memory about it was probably the more accurate, and I see no reason for taking a different view. This interview was followed on July 16, by a letter from the plaintiffs to the defendant in these terms: "In view of your comments during our con-"versation on this subject last week, we assume that you are "prepared to leave the order with Messrs. Jones Bros. Ld.

C. A.

1950

CHARLES RICKARDS LD. v. OPPENHAIM.

Denning L.J.

" until your return from holiday, by which time the car should " be ready for delivery. Every effort will be made on our " part to expedite delivery, and we feel sure you appreciate our " desire to settle this matter amicably." The defendant did not reply to that letter, and Mr. Sachs says that the proper inference was that he assented to it. Upon this point I would say that in order to constitute a waiver there must be conduct which leads the other party reasonably to believe that the strict legal rights will not be insisted upon. The whole essence of waiver is that there must be conduct which evinces an intention to affect the legal relations of the parties. If that cannot properly be inferred, there is no waiver: see *Foot Clinics* (1943) *Ld.* v. *Cooper's Gowns Ld.* (1), and *Bird* v. *Hildage* (2). In this case the conversation and the letter do not show any intention to affect the legal relations in the matter. They were only approaches with a view to settlement from which nothing concrete emerged. I therefore agree with the judge that nothing in them can really be said to amount to a waiver of the clearly expressed notice given on June 29, 1948.

The case therefore comes down to this: there was a contract by these motor traders, the plaintiffs, to supply and fix a body on the chassis within six or seven months. They did not do it. The defendant waived that stipulation. For three months after the time had expired he pressed them for delivery, asking for it first for Ascot and then for his holiday abroad. But still they did not deliver it. Eventually, at the end of June, being tired of waiting any longer, he gave four weeks' notice and said: " at all events, if you do not supply it at the end " of four weeks I must cancel the contract "; and he did cancel it. I see no injustice to the suppliers in saying that that was a reasonable notice. Having originally stipulated for six to seven months, having waited ten months, and still not getting delivery, the defendant was entitled to cancel the contract.

On the counterclaim the judge has held that the chassis should be returned or its value paid. I assume that the plaintiffs will exercise their option of paying for the chassis. They will then own the whole car which they can sell for whatever they can realize. I cannot help sharing the regret of the judge that this car was not sold before and the proceeds used to meet the cost of the work. But we have only to

(1) [1947] K. B. 506.

(2) [1948] 1 K. B. 91.

determine the strict legal rights of the parties. They are that the plaintiffs made a contract which they have not fulfilled and which the defendant justifiably cancelled. I think the decision of the judge was right and that this appeal should be dismissed.

SINGLETON L.J. I am of the same opinion. I wish to say a few words because a case such as this is of importance to the public as well as to the plaintiffs and to the defendant. In my opinion, on the facts as found by Finnemore J., the defendant was entitled to succeed on both claim and counterclaim. The defendant obtained a Rolls Royce chassis through the plaintiffs, and it was through them and on their behalf, really, that the sub-contract was made for the building of the body. It was found that the coachbuilders in question could give, or said that they could give, much earlier delivery than other builders who were in contemplation, and it was upon that basis that the defendant and the plaintiffs decided that Jones Bros. Ld. should build the body. The chassis was delivered in July, 1947, and the contract in regard to the building of the body was entered into about July 11, 1947, though the specification for the bodywork was not finally agreed until August 20, 1947. It was understood then—indeed, it was said—that the body should be completed "within six or, at the most, seven months." That did not take place. There were very many delays. Then in June, 1948, the defendant was told by the manager of the coachbuilders, with whom he had been put in direct communication and relationship by the plaintiffs, that they could finish the body in two weeks' time. Thereupon, he thought it right, in view of what had happened, to write them the letter of June 29, to which Denning L.J. has referred in his judgment. That letter gave them virtually a month in which to complete the body. There was no answer at all to that letter to the coachbuilders. He spoke to them on the telephone, and he wrote again on July 7, 1948. Thereafter, they answered and said that it was impossible to do what he wished.

The question that arises is: was the notice which he gave reasonable, or was the time which he allowed them for completion reasonable in the circumstances? The judge in his judgment said: "He then, on June 29, called for the car "within a month, namely, by July 25, which I think he was "entitled to do, being a reasonable time in which to call for "delivery of the car, which was then very considerably "overdue." The evidence before the judge justified him in coming to that conclusion, and I do not think that this court has any right or duty to interfere with that finding. Mr. Sachs in his argument raised the question whether the contract was a contract for the sale of goods or a contract for work and labour. He submitted that the judge was wrong in coming to the conclusion that this was a contract for the sale of goods, and that, if it was, on the other hand, a contract for work and labour, the principle applied by the judge did not apply and ought not to be used for the purposes of a case of this kind. I am not sure that I agree with the finding of the judge that this was a contract simply for the sale of goods; but I do not think that matters. The law as to a contract for the performance of work is stated in Halsbury's Laws of England, 2nd ed., vol. 3, at pp. 220 to 222, under the heading: "Building Contracts, Engineers and Architects." Paragraph 380 reads, and I think that it is applicable to this case in every respect: "In cases where time has not been made of "the essence of the contract, or where, although time originally "was of the essence of the contract, the time so fixed for "completion has ceased to be applicable by reason of waiver "or otherwise, the employer has still a right by notice to fix "a reasonable time for the completion of the work, and, in "case the contractor does not complete by that time, to "dismiss the contractor* just as a vendor would be entitled "to rescind the contract in case of a contract for sale of land." The public point of view seems to me to be this, and the law ought to be, and, I think is, sufficient to meet it: in such a case the person ordering the work has the right in these circumstances to say, "I will not accept the work unless "you deliver it within a certain time"—which must be a reasonable time. I agree that the appeal should be dismissed.

BUCKNILL L.J. I also agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Keene, Marsland & Co.*; *Capel Cure, Glynn Barton & Co.*

C. G. M.

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*Reporter's note: The note to this passage in para. 380 is: "See "*Taylor* v. *Brown* (1839) 9 L. J. (Ch.) 14 per Lord Langdale M.R.

"at p. 16: 'Where the time is not of the essence of the contract, "'where the contract is to be performed within a time which is not "'defined and there be any unnecessary delay by one party, the "'other has a right to limit the time'." But Lord Langdale M.R. in that case had before him a contract for the sale of land.—C. G. M.

COUGHTREY *v.* PORTER

1950
Jan. 16.

Lord Goddard C.J., Lynskey and Sellers JJ.

Gaming—Justices' power to order destruction of machines—"Special "warrant" under the Gaming Act, 1845*—Purported arrest of person elsewhere than on premises specified in warrant—Power of police officer to grant bail—Gaming Act,* 1845 (8 *&* 9 *Vict. c.* 109), *ss.* 3, 8*—Criminal Justice Administration Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 58), *s.* 21*—Suppression of Unlawful Games Act,* 1541 (33 *Hen.* 8, *c.* 9), *s.* 14.

Complaint was made by a police superintendent that he had reason to suspect that the defendant was using certain premises as a common gaming house within the meaning of the Gaming Act, 1845, and a justice issued a special warrant under that Act. Later an information was laid against the defendant under s. 1 of the Betting Act, 1853, alleging that he had unlawfully used premises for the purpose of money being received through various gaming machines. In purported execution of the warrant the police went to the suspected premises in the defendant's absence and took away nine gaming machines. Later the same day the defendant went voluntarily to the police station, where a police officer arrested him, charged him under the Gaming Act, 1845, and purported to release him on bail. The defendant pleaded guilty to the charge under the Act of 1853 but refused to plead to the charge under the Act of 1845, alleging that the warrant had not been properly executed and that he was therefore not before the court by virtue of it. The justices fined him 15*l.* on the charge to which he had pleaded guilty, and ordered the destruction of the gaming machines.

Held, that the special warrant had not been properly executed as the defendant was not arrested on the premises specified in it but elsewhere; that the police officer purporting to grant the defendant bail had in fact released him, as s. 21 of the Criminal Justice Administration Act, 1914, only empowered him to grant bail to the person named in the warrant and here no person was named; and therefore that, as the defendant was not before the court by virtue of the special warrant issued under the Gaming Act, 1845, but only by virtue of the summons under the Betting Act, 1853, the justices had no power to order the destruction of his gaming machines.

[Reported by Miss Sheila Cobon, Barrister-at-Law.]

CASE STATED by Nottingham justices.

An information was preferred against the defendant, William George Coughtrey, under s. 1 of the Betting Act, 1853, on June 27, 1949, in which it was alleged that between June 19 and 25, 1949, the defendant, being the occupier of Riverside Pleasure Park, Nottingham, unlawfully used it for the purpose of money being received through "fruit" and other gaming machines. On June 21, 1949, complaint was made on oath by the superintendent before a justice of the peace, who issued a special warrant under the Gaming Act, 1845, empowering the police to enter the premises, seize the machines, and arrest "the keepers" of the premises (1).

The justices, at the hearing of the information, had before them that warrant and a charge sheet alleging that the defendant had used the premises as a common gaming house, contrary to the Act of 1845.

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(1) Gaming Act, 1845, s. 3: " . . . . in every case . . . . in "which the justices of peace " . . . . now have by law "authority to enter into any "house, room, or place where "unlawful games shall be suspected to be holden, it shall be "lawful for any justice of the "peace, upon complaint made "before him on oath that there "is reason to suspect any house, "room, or place to be . . . . "used as a common gaming "house, to give authority, by "special warrant . . . . to any "constable, to enter . . . . into "such house, room, or place in "like manner as might have been "done by such justices . . . . "and to arrest, search and bring "before a justice of peace all "such persons found therein as "might have been arrested therein "by such justice of peace had he "been personally present; . . . . "and any such warrant may be "in the form given in the First "Schedule annexed to this Act."

Section 8: " . . . . Where . . . . "any . . . . instruments of gaming " . . . . shall be found in any "house . . . . suspected to be "used as a common gaming house, "and entered under a warrant " . . . . issued under the provisions of this Act . . . . it "shall be lawful for the police "magistrate or justices before "whom any person shall be taken "by virtue of the warrant . . . . "to direct all such . . . . instruments of gaming to be forthwith "destroyed."

Criminal Justice Administration Act, 1914, s. 21, sub-s. 1: "A "justice on issuing a warrant "for the arrest of any person "may . . . . by endorsement on "the warrant, direct that the "person named in the warrant be "on arrest released on his entering "into such a recognizance . . . . "for his appearance as may be "specified in the endorsement . . . ."

Sub-section 2: "Where such an "endorsement is made, the officer "in charge of any police station "to which on arrest the person "named in the warrant is brought "shall discharge him upon "his entering into a recognizance . . . ."

On June 25, 1949, purporting to act under that warrant, the police seized and took away the nine machines, which were produced at the hearing. The defendant was not on the premises at the time. No other person then found on the premises was arrested, nor were proceedings instituted against anyone except the defendant. Two and a quarter hours later he voluntarily visited police headquarters, where a police officer purported to arrest him, charged him under the Gaming Act, 1845, and granted him bail.

Before the justices the defendant pleaded "guilty" to the charge under the Act of 1853, but refused to plead to the charge under the Act of 1845 in the charge sheet, because, he contended, the warrant had not been properly executed and he was not before the court by virtue of it. In any event, he further contended, no information under the Act of 1845 had been preferred.

The justices proceeded to consider the information preferred under the Act of 1853. The defendant contended that they had no power under that Act to order the destruction of the machines; that there was before the justices no charge under the Act of 1845 which did empower them to make such an order; that he had not been found in the place mentioned in the warrant and the warrant could not lawfully be executed at any other place; and that therefore he could not be said to be before the justices by virtue of that warrant.

The justices fined the defendant 15*l*. on the charge to which he had pleaded guilty. They were of opinion that, as he had been arrested under the warrant issued under s. 3 of the Act of 1845, and had been released under s. 21 of the Criminal Justice Administration Act, 1914, on his entering into a recognizance to appear before the justices on June 27, 1949, he had lawfully been brought before them under the warrant. They therefore held that they had power to direct the machines to be destroyed.

The defendant appealed against that order.

J. G. S. Hobson for the defendant. The warrant was never properly executed as the defendant was not arrested on the premises named in the warrant, but elsewhere. He was therefore not before the justices on that warrant, and they

1950

COUGHTREY
v.
PORTER.

had no power to order the destruction of the machines. The warrant issued was in the same form as that set out in sch. I to the Gaming Act, 1845, s. 3 of which empowers constables to arrest all such persons found on suspected premises as could have been arrested by a justice if he had been personally present. The persons whom a justice could arrest are set out in the now-repealed s. 14 of the Suppression of Unlawful Games Act, 1541, as "the keepers of the same [premises]" and "also the persons there haunting, resorting and playing." Those are the words used in the warrant, and the governing word is "there."

Even if the warrant was properly executed, the defendant was still not before the court by virtue of it, as the police officer purporting to grant him bail had no power to do so. By s. 21 of the Criminal Justice Administration Act, 1914, he only had power to grant bail to the person named in the warrant, whereas no one was named in the special warrant here issued.

The defendant was thus not before the court by virtue of the warrant but only by virtue of the summons under the Betting Act, 1853. But it is only s. 8 of the Act of 1845 which empowers justices to order the destruction of gaming machines. Therefore the justices here had no power to make such an order: *Eyre* v. *Brumfield* (1). In *Blake* v. *Beech* (2), where the defendant was brought before justices on a warrant under the Act of 1845 but charged under the Act of 1853 without there being an information or summons under the latter Act, the conviction was quashed.

Vernon Gattie for the prosecution. It is a common practice to start proceedings under the Gaming Act, 1845, by information and warrant, but then to bring the defendant before the court and serve a summons on him under either the Betting Act, 1853, or the Gaming Houses Act, 1854, and for an order for the destruction of gaming machines to be made under the Act of 1845. The whole point here is whether the defendant was before the court by virtue of the Act of 1845.

Even assuming that his arrest was wrongful, such an arrest is merely for the purpose of getting a defendant before the court, and the justices were entitled to hear the case. *Blake* v. *Beech* (2) was considered in *Reg.* v. *Hughes* (3), where Field J., who had given a dissenting judgment in *Blake* v. *Beech* (2),

(1) (1936) 52 T. L. R. 454.
(2) (1876) 1 Ex. D. 320.
(3) (1879) 4 Q. B. D. 614.

said that he adhered to the opinion which he had there expressed. Section 2 of the Betting Act, 1853, provides that every house or room kept for the purpose of the owner or occupier betting with other persons shall be deemed to be a common gaming house within the meaning of the Gaming Act, 1845; and by his plea to the charge under s. 1 of the Betting Act, 1853, s. 2 was brought into operation and it amounted to an admission that the house was a common gaming house. Once he was before the court, whether the warrant was legally or illegally executed, the justices had power to try him. There was a summons under the Act of 1853 and the justices disposed of so much of the matter as came under that Act; but the charge under the Gaming Act, 1845, remained. By his plea the defendant admitted that the premises were kept as a common gaming house. Accordingly the justices had power to make the order which they made.

LORD GODDARD C.J. The only question before the court is whether or not the order directing that certain instruments of gaming should be destroyed can be upheld.

While the court has come to the conclusion that the order has to be quashed, it sympathises with justices who have to construe a mass of sections in these Acts concerned with betting and gaming and are faced with decisions difficult to understand. The relevant sections are not easy to construe and to fit in one with another. I venture to express the hope that this case may in some way come to the attention of the Royal Commission on Betting and Gaming at present sitting, for it is a striking instance of the confusion into which the statutes have come which regulate these matters.

There are no merits in the defendant's case, but that does not matter, because, unless the statute justifies it, an order cannot be made for the destruction of a person's property even if it is gaming property used for the purpose of playing unlawful games. We therefore have to see what was the history of the case and what are the various sections which govern the matter. [His Lordship stated the facts and continued:]

The first point which Mr. Hobson has taken is that the defendant was never lawfully before the justices under the Gaming Act, 1845; that he could not properly be arrested at the police station under that warrant; and that therefore, however he was before the justices, he was not before them by virtue of that warrant. It is necessary on that point to consider the Gaming Act 1845. Section 3 gives power to justices in any case in which they themselves may enter premises to find out if they are common gaming premises, to issue a warrant allowing constables and others to enter and search, and to bring before a justice "all such persons found "therein as might have been arrested therein by such justice ". . . . had he been personally present." To find out what persons the justice himself might have arrested, it is necessary to refer to the Suppression of Unlawful Games Act, 1541. Section 14 of that Act, although now repealed, was on the Statute Book when the Gaming Act, 1845, was passed, and it enabled justices to enter premises suspected of being used for gaming "and as well the keepers of the same, as also the "persons there haunting, resorting and playing, to take, "arrest, and imprison, and them so taken and arrested to keep "in prison, unto such time as the keepers and maintainers of "the said place and games have found sureties to the King's "use."

It is clear, therefore, that under this Act the justices, before they can arrest, have to find the people on the premises; and therefore s. 3 of the Act of 1845 must also be confined to persons whom the constables find on the premises when they execute their warrant. They did not find the defendant in the house when they executed the warrant: they arrested him afterwards; and they did not take him immediately before the justices, probably because no justices were sitting. The police officer proceeded to grant the defendant bail, purporting to act under s. 21 of the Criminal Justice Administration Act, 1914. [His Lordship read the section.] But a justice can only direct by endorsement that the person named in the warrant be bailed, and the police officer has only power to bail the person named in the warrant. As nobody was named in the warrant, it follows that that section did not apply. Once the defendant was released by the police officer, he was actually released and not merely given bail.

Mr. Hobson argues, and I think rightly, that the defendant was not before the justices by virtue of the warrant: he was there in fact by virtue of the summons which had been issued under the Betting Act, 1853. In the first place he had not been arrested under that warrant; secondly, by his being released, the effect of the warrant had expired.

It now becomes necessary to see what powers the justices have to order articles of gaming to be destroyed. The Betting Act, 1853, gives them power to have the articles found brought before them, but no provision was made in that Act whereby those articles might be destroyed. Section 8 of the Gaming Act, 1845, authorizes justices to order the destruction of instruments of gaming; and it was decided in *Eyre* v. *Brumfield* (1) that that is the only section which enables justices to make an order for destruction. It follows that if the defendant was not before the court by virtue of the warrant issued under the Gaming Act, 1845, there was no power to order the destruction of these articles of gaming.

Another objection, in my opinion valid, was taken: the defendant was asked before the justices to plead to the charge under the Act of 1845. He refused to plead one way or the other, contending that he was not properly before the court. Instead of telling the defendant that, if he would not plead, they would exercise their powers, enter a plea of Not Guilty and proceed with the case, the justices accepted the position and allowed the matter to go without any plea at all, and did not adjudicate on the charge under the Act of 1845. They heard no evidence, so that there was no evidence before them to show that these were articles of gaming.

For all these reasons it seems to me that it is impossible to uphold the order made, and, although the defendant was properly convicted and fined under the Betting Act, 1853, the order for the destruction of these machines must be quashed.

LYNSKEY J. I agree.

SELLERS J. I agree.

Appeal allowed.

Solicitors: *Sidney C. Elphick, for Clayton, Son and Ellis, Nottingham; Sharpe, Pritchard & Co., for the Town Clerk, Nottingham.*

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(1) 52 T. L. R. 454.

Followed. HIGHAM *v.* HAVANT AND WATERLOO U. D. C. [1951] 1 K. B. 509

1949
Dec. 15.

Lord Goddard C.J., Hilbery and Cassels JJ.

PILLING *v.* ABERGELE URBAN DISTRICT COUNCIL.

Local government—Public health—Movable dwellings—Licence to use land as camping ground—User detrimental to amenities of district—Refusal of licence on that ground—Validity—Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 269.

Section 269, sub-s. 1, of the Public Health Act, 1936, empowers a local authority to grant " (i) licences authorising persons to "allow land occupied by them . . . . to be used as sites for " movable dwellings."

A local authority refused to grant a licence under that subsection on the ground that the " site was unsuitable because " such use would be detrimental to the amenities of the district, " particularly on account of the close proximity of other " dwellings." On appeal by the applicant to justices, they affirmed that refusal on the ground that local authorities were not restricted by s. 269 as to the grounds on which they might refuse such a licence.

Held, that, as the Public Health Act, 1936, concerned only matters relating to health and sanitation, the discretion given to local authorities by s. 269 was a discretion to consider an application for a licence from the point of view of those matters only; that the local authority in question were therefore not entitled to take the matter of amenities into account; and that, as they had given their reason for refusing to grant the licence and that reason was an invalid one, the justices ought to have allowed the applicant's appeal.

CASE STATED by Denbighshire justices.

The applicant owned and occupied land at Pensarn. The respondents, Abergele Rural District Council, refused to grant him a licence under s. 269 of the Public Health Act, 1936, authorizing him to allow that land to be used as a site for movable dwellings, on the ground " that the site is unsuitable " because such use would be detrimental to the amenities " of the district, particularly on account of the close proximity " of other dwellings."

The applicant appealed to the justices from that refusal, contending that the ground given for it was outside the scope of the Public Health Act, 1936. The justices, being of opinion (i) that local authorities were not restricted under s. 269 of the Act as to the grounds on which they might refuse a licence, and (ii) that the council had exercised their discretion in a fair and reasonable manner, dismissed the appeal.

The applicant now appealed from that decision.

H. A. Hill for the applicant. The local authority refused to grant the licence for a wrong reason. The Public Health Act, 1936, is designed to meet evils relating only to health. Its title is: "An Act to consolidate with amendments "certain enactments relating to public health." In that respect it is to be contrasted with the Public Health Act, 1875. [He referred in detail to the Act of 1936, especially s. 269.] Questions arising under s. 269 must be considered from the point of view of health only. If the local authority did not wish the land to be used for camping for reasons of amenity they should have taken power to make a scheme with respect to the amenities under the town and country planning legislation. It was entirely their own fault that they had not done so.

A. E. Baucher for the local authority. Section 269 of the Public Health Act, 1936, is not intended only to cover matters relating to health. Sections 268 and 269 are headed: "Tents, vans, sheds, &c." Section 268, sub-s. 1, applies to such structures the provisions of Part III, V, VII, and XII of the Act, which cover a large variety of matters. Section 269, sub-s. 1 (i), does not compel a local authority to grant a licence or to give reasons for not doing so. They have an absolute discretion to refuse a licence, and the court has no jurisdiction to consider the reasons which led them to refuse it: *Swindon Corporation* v. *Pearce and Pugh* (1).

LORD GODDARD C.J. The local authority refused the applicant the licence for what may compendiously be called town-planning reasons, and the question is whether they had power to consider such matters in coming to a conclusion whether they should grant a licence or not. If they had merely refused the licence without giving any grounds, it might have been difficult for the applicant successfully to bring an appeal; but I have always understood the law to be that, where a duty to hear and determine a question is conferred on a tribunal of any kind, or on a local authority, they state their reasons for their decision, and the reasons which they state show that they have taken into account matters which they ought not to have taken into account, or that they have failed to take matters into account which they ought to have taken into account, the court to which an appeal lies can and ought to adjudicate on the matter.

(1) [1948] 2 K. B. 301.

The real question in the present case arises under the first reason which the justices gave for dismissing the appeal to them, namely "that local authorities are not restricted by s. 269 of "the Public Health Act, 1936, as to the grounds on which they "may refuse a licence."

I think it clear that s. 269, especially if it is considered in relation to the Act as a whole, is concerned with sanitary matters and with sanitary matters alone. Mr. Hill has pointed out in argument that the title of the Act of 1936 is "An Act to consolidate with amendments certain enactments "relating to public health," and that, unlike the Public Health Act, 1875, it is an Act concerned only with sanitary and health matters. The Act of 1875 provided for a variety of other matters which come within the purview of local sanitary authorities, as Mr. Hill pointed out, such as the paving and making up of private streets; but the Act of 1936 is a sanitary and health Act purely and simply.

Section 269 of the Act is in Part XI, which is headed "Miscellaneous." That Part starts with s. 259. Sections 259 to 267 are concerned with sanitary and health matters in relation to watercourses and ships. Sections 268 and 269 are headed "Tents, vans, sheds, &c." Section 268, sub-s. 1, applies Parts III, VII and XII of the Act, and the provisions of Part II. relating to filthy or verminous premises, to tents, vans, sheds and similar structures used for human habitation. Those provisions, again, relate to nuisances or other matters purely connected with health, and s. 268, sub-s. 1, is applying their provisions to such structures as tents and vans which may fall within the definition of "movable dwelling" in s. 269, sub-s. 8 (i).

As regards s. 269, sub-s. 1, it is clear to me that, except for the words "its removal at the end of a specified period," in sub-s. 1 (*b*) which give the authority power to determine what is to be done at the end of that period, the whole sub-section is concerned only with sanitary matters.

Sub-section 2 of s. 269 shows that a person may use his land for six weeks, if he uses it continuously, or sixty days in the year altogether, without a licence. That, I suppose, is because it was considered that six weeks would not be sufficient to cause a nuisance or to foul the land to such an extent that it might become a nuisance. I think that Mr. Hill was justified in saying that that was an odd provision to find in the Act if the local authority were entitled to take amenities into account, because the detriment to amenities, or the disfigurement of the neighbourhood, if amenities were in question, would be permitted for six weeks continuously or for sixty days during the whole of the year. Sub-section 6 of s. 269, again, seems to point entirely to this being a public-health or sanitary section.

We have to construe this Act of 1936 and to consider whether s. 269 gives a local authority considering an application for a licence under sub-s. 1 (i) power to take into consideration the amenities of the district, or whether they are confined to public-health matters. It is to the complicated town-planning legislation which has been the subject of various Acts of Parliament since 1932 that, I think, appeal must be made if a question with regard to amenities arises. It may be that the local authority as a town-planning authority have some power in that respect. On that question I need not express any opinion because the application in the present case was purely an application under s. 269 of the Public Health Act, 1936, and the justices have held that the local authority had an uncontrolled, unrestricted discretion. In my opinion that was wrong: I think that the discretion which the section gives to the local authority is to consider such an application for the grant of a licence from the point of view of public health and the sanitary conditions at the site, and that they are not entitled under this section to take into account the question of local amenities.

I therefore think that, when the applicant appealed to the justices, as the local authority had given their reason for refusing a licence and that reason was a wrong one, they ought to have allowed the appeal. The consequence is that we allow this appeal.

HILBERY J. I concur.

CASSELS J. I agree.

Appeal allowed.

Solicitors: *Vizard, Oldham, Crowder & Cash, for Chamberlain, Johnson and Parke, Llandudno; Jaques and Co., for Cyril Jones, Son and Williams, Wrexham.*

R. P. C.

1949
Dec. 13, 14, 15 *and* 21.

Lord Goddard C.J., Hilbery and Cassels JJ.

SURREY COUNTY VALUATION COMMITTEE *v.* CHESSINGTON ZOO LD.

Rating—Private zoo—Valuation—Profits basis—No comparable hereditament—Consideration of profits—Deductions—Interest on capital—Profits earned off hereditament—Profits tax.

A mansion at Chessington, Surrey, and its grounds were equipped, by adaptation of and addition to existing buildings, as a zoological gardens and amusement park, and that hereditament was run for profit by a company. The hereditament had originally no physical advantages to make it specially suitable for such use apart from a favourable geographical position and good transport facilities. No other hereditament in the South of England now offered to the public the same combination of interests and entertainment. There were no comparable hereditaments let at rents which were of assistance in assessing the value for rating purposes of the hereditament, except similar mansions and grounds used as private residences. Quarter sessions found that the hereditament enjoyed a quasi-monopoly and that a prospective tenant of it, in determining what rent he would be prepared to pay, would have regard to the profit that could be earned by it. They therefore assessed the annual value of the hereditament at 7,230*l.* gross and 6,507*l.* rateable by taking a proportion of the estimated average annual trading profits of the company, after deducting estimated amounts in respect of directors' emoluments, audit fee, sale of produce and depreciation. No specific deduction was made in respect of the company's capital, profits from letting out animals outside the hereditament for show by touring companies, or profits tax.

Held (by Lord Goddard C.J. and Hilbery J.; Cassels J. dissenting) that quarter sessions, being entitled to take trading profits into consideration as they were satisfied that there was no other method by which they could arrive at a hypothetical rent, had not applied a wrong principle, and that they had not therefore erred in law in making the assessments in question, and in particular were entitled to disregard profits tax as reducing the profits of the undertaking and to consider the hereditament as comprising all the structures erected on it for the purposes of the business carried on there.

Held, further, that the profits made by letting out animals to touring companies were also properly taken into account, as the hereditament was specially equipped for the storage of such animals and it was immaterial whether the profits were earned by inviting inspection of the animals at the hereditament or by letting them out for inspection elsewhere.

Per Cassels J., dissenting (on both points). When profits are made the basis of assessment they should be considered at their lowest, and nothing should be included which can reasonably be excluded in both receipts and expenditure. Due allowance should be made for the change of personality in control, for the speculative character of the business, for the risks dependent on weather, and for the fluctuating costs and difficulties of labour and material. Quarter sessions had failed to give sufficient consideration to these items.

The sums earned by the letting of animals to touring showmen should not have been included: the sums were earned far away from the hereditament, the hypothetical tenant might not wish to continue that side line, and the hypothetical landlord might not include it in the tenancy.

CASE STATED by the Standing (rating appeals) Committee of Surrey Quarter Sessions.

The appellants, Chessington Zoo, Ld., owned and occupied a hereditament (known as Chessington Zoo) comprising, among other things, a mansion, cages for animals, and an amusement park, which they carried on for profit as private zoological gardens. Before June 14, 1948, that hereditament was assessed at 800*l.* gross value and 663*l.* rateable value. Early in 1948 Surbiton rating authority proposed that those figures should be increased to 3,000*l.* and 2,497*l.* respectively. The company objected. On March 24, 1948, the respondents, Surrey County Valuation Committee, made a proposal to amend the list in respect of the hereditament on the ground that the assessment was insufficient, incorrect, and unfair, and that additions and alterations had been made to the property. They proposed figures of 8,889*l.* gross value and 8,000*l.* rateable value (in place of the original figures of 800*l.* and 663*l.*) The rating authority and the company objected. Surrey (North-Eastern Area) Assessment Committee heard that proposal and the objections to it, and assessed the hereditament at 3,170*l.* gross value and 2,853*l.* rateable value.

The valuation committee appealed from that decision to quarter sessions, who allowed that appeal and assessed the gross value at 7,230*l.* and the rateable value at 6,507*l.* Quarter sessions assessed the value of the hereditament by starting with the estimated average annual trading profit of Chessington Zoo for the years 1947 to 1952. From that figure they made estimated deductions for directors' emoluments, audit fee, sale of produce, and depreciation, and then arrived at the figures in question by taking a proportion of that balance. The company appealed.

The facts, as stated by quarter sessions, were as follows: Chessington Park is situated on the main London to Leatherhead Road at Chessington, about four miles from

Kingston and Leatherhead, and fourteen miles from London. It is just within the proposed "Green Belt" zone and in rural surroundings just outside the built-up district of Surrey. It comprises a mansion, brick-and-timber subsidiary buildings a circus building, cages, and about twenty-nine acres of land used as zoological gardens, amusement park, circus, refreshment rooms and licensed premises. The amusement park consists of such amusements as a ghost train, "dodgem" cars, big wheel, hall of mirrors, miniature railway, boating pool, pets' corner, and other similar entertainments making a special appeal to children. An additional charge above that for entrance to the hereditament is made by the company in varying amounts for most of these amusements. Four of the buildings were licensed at the material date for the sale of intoxicating liquors. The ballroom of the mansion is licensed for dancing with a maximum of a hundred dancers. There is a licence for music on the lawns, but no dancing has ever taken place on them. There are regular services of omnibuses by which the hereditament can be reached from all directions, and it is also served by electric trains from London to Chessington South Station, which is a little more than half-a-mile distant and was opened for traffic in May, 1939, mainly to serve the needs of the public wishing to visit the hereditament.

Chessington Zoo was founded by the late Reginald Stuart Goddard, who had bought for the purpose the mansion with land surrounding it which, apart from its geographical situation and transport facilities, had no physical advantages to make it specially suitable for the purpose of a zoo. Goddard equipped the mansion for use as a restaurant, refreshment rooms, offices and staff accommodation, adapted the stabling and other buildings, and erected buildings and structures for the housing of animals and other purposes, including amusements of various kinds (mainly for children); and opened the hereditaments so equipped and adapted to the public in May, 1931. Under the direction and management of Goddard, and owing to his personality, skill and energy, the business gradually developed, improvements and additions were made, the collection of animals was enlarged and improved, and more amusement facilities were provided. In March, 1946, the appellant company was formed, and it purchased the hereditament as a going concern from Goddard for 130,000*l*.

At all times the foundation of the business had been the zoo, although its popularity with the public was derived in large measure from the ancillary attractions. Without a collection of animals adequate to represent the zoological part of the business no one would be likely to take the hereditament simply as an amusement park. There was no other hereditament in the South of England offering to the public the same combination of interests and entertainment. The provision of animals and the operation of a zoo as a business undertaking were highly speculative and required experience and expert knowledge. Restrictions on the importation of animals and other factors would in March, 1948, have made it difficult to build up a collection of animals such as that then belonging to the company.

Before 1939 the net receipts of the business never exceeded 5,000*l.* a year. Immediately after the war of 1939–45 the volume of business and the profits increased enormously, and reached a peak in the year ending March 31, 1947. In that year the net receipts amounted to 49,453*l.* In the following year they declined to 39,828*l.*, and any reasonable man in March, 1948, would have anticipated further and substantial drops in net receipts.

There were no comparable hereditaments let at rents which would be of assistance in arriving at the value of the hereditament, but similar mansions and grounds used as private residences had recently been assessed at 750*l.* and 600*l.* gross and rateable value respectively.

In normal times no serious difficulty would have presented itself in removing the company's business to other premises. In 1947 and 1948 the restriction on building and the shortage of steel would have caused considerable difficulty and delay; and, if it had been possible in March, 1947, to rent a mansion with the necessary land as an alternative site for the business carried on by the company, a period of from three to five years from that date would have been required for the erection of the buildings and structures necessary for the purpose of the business. It was unlikely that the transport facilities to any such alternative premises would have been as good as at Chessington, and further delay might have been caused by the necessity of obtaining planning approval under the Town and Country Planning Act, 1947.

Quarter sessions, considering the question to be what rent a hypothetical tenant would be prepared to pay for the hereditament, came to the conclusion as a matter of fact that

1949

SURREY COUNTY VALUATION COMMITTEE v. CHESSINGTON ZOO LD.

the hereditament at the relevant date enjoyed a quasi-monopoly, and that a prospective tenant, in determining what rent he would be prepared to pay, would have regard to the profit that could be earned by it. They considered that the "contractors "basis" of assessment was not appropriate for the reason, among others, that it took no account of the exceptionally attractive situation in relation to omnibus and railway services in which the hereditament was placed. Having taken all those matters into consideration, they assessed the hereditament at 7,230*l.*, gross value and 6,507*l.* rateable value.

The questions upon which the opinion of the court was desired were: (i) whether the appeals committee of quarter sessions were wrong in law in deciding to apply the profits basis in order to arrive at the value of the hereditament; and (ii) if they were justified in so doing, whether they had erred in point of law in their application of that principle to the facts of the case.

Percy Lamb K.C. and *Widgery* for the company. The company are appealing on the grounds (i) that quarter sessions erred in law in valuing the company's commercial undertaking on a profits basis; (ii) that, in arriving at their figures, they included matters which should not have been included and excluded matters which should have been included; (iii) that, having determined the primary facts, they have drawn wrong conclusions in law from them; and (iv) that they have fallen into the error adumbrated in *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (1) of confusing the method of measurement with the thing to be measured.

With regard to (i) It is apparent that in the present case quarter sessions were wholly wrong in law. The company's undertaking is a commercial one comparable to a shop or chambers in the Temple, as opposed to a public utility undertaking which is properly assessed on a profits basis. It is not disputed that the profits earned by the company are matters which may be put in evidence and considered by quarter sessions in making their assessment. A public untility undertaking, in the absence of special circumstances, must be assessed on the profits basis as laid down in the *Kingston* case (1), and that basis is only applied in the case of public utility undertakings: see per Blackburn J., *Mersey Docks and Harbour*

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(1) [1926] A. C. 331.

Board v. *Liverpool Overseers* (1), and per Atkinson J. in *Aberaman Ex-servicemen's Club and Institute* v. *Aberdare Urban District Council* (2).

The court then intimated that they desired at that stage to hear counsel for the valuation committee.

Geoffrey Lawrence for the valuation committee. It is conceded that the valuation in the present case looks as if it had been made on a profits basis. In reaching their conclusion quarter sessions had regard to the profits, and in the case stated they have declared, perhaps ill-advisedly, the method by which they reached their valuation. That the evidence of profits was admissible is clear from *Cartwright* v. *Sculcoates Union* (3); see per Lord Macnaghten. The appeals committee had to arrive at a hypothetical rent for the hereditament. There were no comparable hereditaments let at rents from which a hypothetical rent for the hereditament in question could be deduced. That being so, the committee were entitled to consider profits if there was any quality inherent in the hereditament which gave it a capacity to earn profits. If the profits had been earned only by the profit-earning capacity of the occupier, as distinguished from that of the hereditament, it is conceded that it would have been improper to apply a profits basis. In the present case the profit-earning capacity was in the hereditament, not in the occupier. The combination in the hereditament of zoo and amusement park is unique. The present case is similar to *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (4), in which evidence was admitted of the receipts and expenditure of the owners of lairages for the slaughter of foreign cattle in assessing them for poor rate on the grounds that there were no similar tenements in the neighbourhood with which a comparison could be made, and that the hereditament itself had a profit-earning capacity. Similarly in the present case quarter sessions were entitled to take profits into consideration. They did not in fact apply the "profits basis" as described in *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (5). They could have applied that basis in toto. The appeals committee, in effect, found as a fact that the profit-earning capacity in the present case was in the hereditament and not in the occupier; their findings showed that the hereditament could be run at a profit owing to its exceptionally favourable geographical situation.

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(1) (1873) L. R. 9 Q. B. 84, 96.

(2) [1948] 1 K. B. 332, 337.

(3) [1900] A. C. 150, 153.

(4) [1900] 1 Q. B. 143; affirmed [1901] A. C. 175.

(5) [1926] A. C. 331.

[He also referred to *Reg.* v. *Verrall* (1) ; *Clark* v. *Fisherton-Angar Overseers* (2) ; *Edinburgh Street Tramways* v. *Edinburgh Corporation* (3) ; *Dodds* v. *South Shields Assessment Committee* (4) ; *Racecourse Betting Control Board* v. *Brighton Corporation* (5).]

Lamb, K.C., in reply. *Racecourse Betting Control Board* v. *Brighton Corporation* (5) is the only case in which the profits basis was applied to something other than a public utility undertaking. That case was not followed in *Scottish Greyhound Racing Co.* v. *Glasgow Assessor* (6). Profits might, on the other hand, properly be taken into consideration in the present case, as already conceded.

But quarter sessions failed to take into consideration, and to deduct from the profits, such items as interest on capital, and the profit-earning capacity of the occupiers due to their special skill. The figures for profits on which the assessment was based included profits earned by the company outside the hereditament, e.g., in letting out animals for show throughout the country. Again, excess profits tax should have been deducted : *Yeovil Rural District Council* v. *South Somerset and District Electricity Co. Ld.* (7) ; and see per Viscount Cave L.C. in *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (8).

That quarter sessions attempted to arrive at a rent by taking, as their basis, the trading figure for profits showed conclusively that they muddled the conception of profits and that of rent. They were rating profits as profits, contrary to the principle laid down by Blackburn J. in *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (9).

The profits basis was not applied in the present case : if quarter sessions took trading profits into consideration they ought to have ascertained the proportions respectively earned by the inherent profit-earning capacity of the hereditament and attributable to the skill and ability of the occupiers.

Cur. adv. vult.

Dec. 21. The following judgments were read.

(1) (1875) 1 Q. B. D. 9.
(2) (1880) 6 Q. B. D. 139.
(3) [1894] A. C. 456.
(4) [1895] 2 Q. B. 133.
(5) [1941] 2 K. B. 287.
(6) 1947 S. C. 380.
(7) [1948] 1 K. B. 130.
(8) [1926] A. C. 331, 338, 339.
(9) L. R. 9 Q. B. 84.

LORD GODDARD C.J. [referred to the facts and continued :] It is well known and has often been pointed out in rating cases that, in rating hereditaments of an exceptional character, by which I mean those that are neither houses, shops nor factories in an industrial area, rating surveyors have ever since the Parochial Assessment Act, 1836, had to find various formulæ and methods to enable them to answer the questions to which the Rating Acts require an answer. They have to find a rent for premises which are not, probably never would be, and, in some cases, such as public utility undertakings, could never be, let at a rent. To take one familiar instance, railways were hardly known when the Parochial Assessment Act was passed, but as the country became covered with a network of railways it became necessary to find some method by which the requirements of the Acts could be met. So, too, in the case of large public utility undertakings such as gas and water works and, later, electricity power stations. As I have said, various formulæ and devices were adopted, many of which have passed into common use and have received the approval of the courts. Two of the best known are what are called the contractor's basis and the profits basis; but, whatever method is applied and whatever formula is adopted, the aim and object must always be the same—to find a notional rent which a tenant would be likely to pay if there could be a letting; and how that is to be ascertained must depend largely upon the nature of the hereditament which is to be the subject of the assessment. One principle that has been laid down and from which no departure is allowed is that profits must not be rated as profits.

The leading authority on that subject is the judgment of Blackburn J. in *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (1), so often cited and so well known that I need not quote passages from it. If there is a terrace of houses or a street of shops all of more or less the same size, whether they are let at a rack rent or not, there is no difficulty, as a rule, in ascertaining what a tenant would pay by way of rent. The fact that one shopkeeper may be making a large profit while his next door neighbour may be making a small one, or even running at a loss, is immaterial in assessing the rent which a tenant could reasonably be expected to pay for the premises in question. But it becomes much more difficult when one has to consider the case of a property such as the

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(1) L.R. 9 Q.B. 84.

1949

SURREY COUNTY VALUATION COMMITTEE v. CHESINGTON ZOO LD.

Lord Goddard C.J.

hereditament in the present case with which nothing can be compared and which is being run as a commercial proposition. The question which has to be answered is what, if there were a landlord and a tenant, the landlord would be likely to demand and the tenant to pay.

In a case in which the property is owned and occupied by the same person, it seems to me that one has to consider the case not only of a hypothetical tenant but also of a hypothetical landlord. The one has premises to let and the other desires to take them to carry on a particular business. We must, I think, approach this case on the hypothesis that a landlord has premises to let which are not only appropriate for, but fitted up as, a zoological garden and amusement park. The tenant is to be regarded as taking premises at the present time where he can carry on his business, fitted as they are with cages suitable for wild animals, bathing pools, restaurants, and so forth already provided and ready for use. In valuing such a hereditament, it seems to me, no assistance whatever can be derived by ascertaining what a tenant would be likely to pay as rent for a country mansion with park attached which he intended to use as a private residence, or even as a school or other institution. Nor does it seem to me right to start by finding out the figure which would be paid as rent were the premises to be used for domestic, even if institutional, purposes, and then to consider how much it would cost to erect the cages, restaurants and other buildings, and to lay out the place, to charge so much upon the tenants' capital, and then to take those figures and add something for the peculiarly favourable transport facilities. I think that we ought to look at the position as though a landowner had premises to offer equipped for a zoo and amusement park which a person desirous of carrying on that class of business desired to take.

The appeals committee of quarter sessions have told us that they arrived at their figures on the profits basis, and counsel for the company have strongly contended that, if that is so, their decision must be wrong because the profits basis has never been applied to a commercial but only to a public utility undertaking. This, in my opinion, depends very largely on what the appeals committee meant by saying that they proceeded on "the profits basis." "The profits basis" as applied to public utility undertakings is best described in the speech of Viscount Cave L.C. in *Kingston Union Assessment*

Committee v. *Metropolitan Water Board* (1). Since that decision it has been regarded as settled law that public utility undertakings are always to be rated on the basis which is to be found stated in that case. It is quite clear that quarter sessions did not purport to apply the formula usually known as "the profits basis," and described in that case, to the hereditament in the present case: they started by taking the trading profits. If they had applied the profits basis applicable to public utility undertakings they would have had to start by taking the gross receipts. It would, I think, have been more accurate if quarter sessions had said that they had applied *a* profits basis. *The* profits basis, as it is generally understood, is that to which I have just referred.

That quarter sessions have had regard to the trading profits of the company as the main basis of their assessment is beyond question, and nobody disputes it. It appears from the case stated that they first started with the company's actual trading profit for 1947, which they ascertained from the company's published profit and loss account for that year. For the five succeeding years they have estimated the profits on a descending, and indeed sharply descending, scale. Those figures were, we were told, in fact taken from the evidence adduced by the company in the sense that their witnesses stated that they expected that the profits would be reduced in succeeding years by the estimated amount. It seems to be agreed that amusement caterers and entrepreneurs regarded 1947 as the peak year for profits, and anticipated a fairly sharp diminution, in a descending scale, for the years following that one. Quarter sessions estimated the trading profit for the years 1947 to 1952 inclusive at 170,961*l*., giving an average of 28,493*l*. a year. From that trading profit they have made deductions for directors' emoluments, audit fee, sale of produce and depreciation, all of which were, of course, matters of estimate. Having arrived at a figure which represented the net trading receipts before deduction of rates, they have divided that balance between the tenant, the landlord, and the rating authority, arriving at the figures of 7,230*l*. gross and 6,507*l*. rateable value for the hereditament.

The company attacked that method in toto. They submitted that that was rating profits pure and simple, and that it was therefore in direct disregard of the principles laid down in *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (2)

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(1) [1926] A. C. 331.

(2) L. R. 9 Q. B. 84.

1949

SURREY COUNTY VALUATION COMMITTEE v. CHESSINGTON ZOO LD.

Lord Goddard C.J.

and consistently followed. But quarter sessions, on the other hand, profess to have adopted that plan as the only method open to them which would enable them to fix a rent. The company do not contend that it is not open to the committee to take into account profits as one element, but they say that it is inadmissible to rely upon profits as the only evidence of the hypothetical rent. I do not propose to refer to all the cases which were cited before us. It is, I think, clear that, while, in what have been called ordinary cases, questions as to gross receipts or net receipts or profits cannot be investigated, there are cases which have been regarded by courts as exceptional, and there the rating authority can have regard to the profits which have been made; and, indeed, as it seems to me, in many cases they can have no other basis for fixing the rent.

In *Reg.* v. *Verrall* (1), where the hereditament in question was the Epsom Race Course, the court held that books of the appellants were clearly elements for the consideration of the justices in arriving at its value; and in *Clark* v. *Fisherton-Angar Overseers* (2), the court allowed an inquiry into the receipts of the tenant of a railway refreshment room as being the best method of ascertaining what rent he would be willing to pay.

On the other hand, in *Dodds* v. *South Shields Assessment Committee* (3) the appeal was against the valuation of a public house, and there were many other public houses in the town which could be compared with the one in question. The court refused to admit evidence there of the average weekly takings, on the grounds that there was nothing exceptional in the case of a public house and that the ordinary methods of valuation should be adopted. It seems to me clear that in that case the Court of Appeal recognized that, if there were a hereditament which could be classed as exceptional in the sense that there was no other hereditament with which it could be compared, such evidence would be admissible. In *Cartwright* v. *Sculcoates Union* (4), the House of Lords held that, in assessing the value of a public house, the existence of the licence and the amount of trade were elements to be considered in arriving at the rent, and that evidence of those facts was always admissible and might be necessary where the ordinary evidence of market value by comparison with other

(1) 1 Q. B. D. 9.

(2) 6 Q. B. D. 139.

(3) [1895] 2 Q. B. 133.

(4) [1900] A. C. 150.

public houses was not to be had. They also held that evidence of profits was admissible though an inquiry into profits should be avoided where possible because it was regarded as oppressive.

It is true that Lord Davey there repudiated the distinction between exceptional and ordinary cases which had been made in *Dodds* v. *South Shields Assessment Committee* (1), but he went on to say (2): " You have in each case to find out " in the best way you can what is the rent which a tenant may " reasonably be expected to give, and if the best way under the " particular circumstances is to ascertain the use which a tenant " might expect to be able to make of the premises, the facility " afforded by the premises for the carrying on of a trade " appears to me to be a primary and elementary consideration " in the case." Then he said: " It is not that you rate the " profits, it is not that you rate the man's skill and judgment " or discretion in the mode of carrying on the business, but " you have to ascertain what sort of a trade the hypothetical " tenant, as he is called, may reasonably expect to be able to " carry on on those premises as an element in determining " the rent he would be willing to offer."

As I have said above, the company did not contend that profits were not an element to be taken into account, but they said that they were only one element. And what is to happen if quarter sessions find that it is the only element on which they can rely? I have already given my reasons for thinking, as quarter sessions obviously did, that the rent which might be paid for Chessington Park if used as a residence or school affords no criterion at all, and that we ought to look upon the case as one in which the property is let with all the facilities and amenities for the business there carried on.

In this connexion, I desire to express my agreement with this passage from the judgment in *Racecourse Betting Control Board* v. *Brighton Corporation* (3) of Wrottesley J., a judge of great experience in such cases: " What happens in the " market is the best evidence of the value of the commodities " dealt with in the market, and where the best evidence is at " hand, courts of law refuse to admit any other. But, at any " rate, in the case of premises used for making profits, 'it is " 'a mistake to suppose that valuation by rental is a process " 'dissociated from the idea of profit,' to use the language " of Lord Watson in *Edinburgh Street Tramways* v. *Edinburgh* " *Corporation* (4). In the case of premises used only to make

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(1) [1895] 2 Q. B. 133.
(2) [1900] A. C. 150, 159.
(3) [1941] 2 K. B. 287, 296.
(4) [1894] A. C. 456, 475.

"a profit, such as the premises in this case, and not capable of "being valued by comparison with other similar premises, "the proposed tenant and the landlord would alike be thrown "back on to a question of the amount of possible profits to "flow from the occupation." If, then, there is such a property, as I think there is, and if quarter sessions are satisfied that there is no way by which they can arrive at a rent other than by looking at the trading profits to ascertain what is the value of the use of the hereditament to the tenant, I cannot see that they can be said to have applied a wrong principle. Obviously they have had clearly in mind in the present case that their duty was to arrive at a rent, and they have done so by estimating the net profit and then apportioning it between the tenant, the landlord, and the rating authority. Assuming that they were entitled to proceed on that basis, it is not, I think, for this court to alter their figures or express disapproval of the assessment of those shares, for that, after all, is a question of fact. In my opinion, therefore, quarter sessions were entitled to proceed on the basis on which they did.

But it was argued that at any rate their figures must be wrong in some respects. First, it was said that they must have taken into account the tenant's capital, which they had no right to do. It may be that, in arriving at the trading profits, it is inevitable that the tenant's capital enters into the calculation, as do landlord's fixtures; but the basis of the present assessment, and, as I think, the only basis which quarter sessions could find, was to take the profits made on the hereditament as a whole; and, if I am right in what I have said earlier, that one must look at this matter as though a hypothetical landlord were letting these premises with all these erections on them, I do not think that quarter sessions have applied a wrong principle.

Another point which was strongly urged upon us by Mr. Lamb was that the method adopted has had the inevitable result of taking into account the profits earned off the hereditament in question. This arises because it seems to have been the practice of the company to let out from time to time some of the animals, and such other things as would be used by circus proprietors, to the owners of smaller shows touring throughout the country. It seems to me that the answer is that that is just one of the things, or rather one of the opportunities of making a profit, which a tenant would take into account because these premises give peculiar facilities.

To enable the company to earn the profit they must have a place not merely for storage, but where they can keep their wild beasts, and so forth, which from time to time they may let to a circus proprietor to show; but, when one is considering a matter of this sort, it seems to me to make no difference whether a certain sum is earned by letting people look at the animals in their cages at Chessington or in a cage outside the actual hereditament. It is all part of the trading profit which these premises give the company the opportunity to earn.

Other questions were raised with regard to whether or not the profits tax was taken into account. I think it clear, and indeed it was not disputed, that questions with regard to the profits tax were raised before quarter sessions. If they have applied the right principle, if they have had fully before them all the considerations which ought to have entered into their calculations and to which they ought to have paid regard, I do not think it open to the court to examine meticulously every figure.

The case is no doubt one of considerable importance, and it is perhaps satisfactory to know that our judgment is open to review elsewhere. For myself, I would answer both the questions submitted in the negative, and would accordingly dismiss the appeal.

HILBERY J. I have finally but reluctantly, and not without some hesitation, come to the same conclusion as my Lord, and for the same reasons. I would only add that in my opinion it is not possible to say, as a matter of law, that quarter sessions were wrong in not taking into consideration the profits tax as reducing the trading profits which a hypothetical tenant might regard the premises as capable of producing. Profits tax is quite different from excess profits tax. The latter tax took away from the trader occupying the premises the whole of his profits which were in excess of certain standard profits. That excess could not be of any beneficial value to the tenant. Furthermore, its amount depended upon a standard figure particular to the person liable to pay it. The profits tax is a tax levied on profits generally and is not confined to a part of the profits in excess of a standard figure. For the purposes of this case, therefore, I am of the opinion that the appeals committee were entitled to disregard profits tax for the same reasons that income tax which a prospective or hypothetical tenant will have to pay out of profits made out of an occupation of the premises in question has to be disregarded.

CASSELS J. With diffidence, I find myself unable to agree with the conclusions at which my Lords have arrived. Proposals for the assessment of this hereditament for the purpose of rating show a steep rise which is remarkable. Chessington Zoo was established eighteen years ago. Its founder died at the end of 1946, nine months after the formation of the company of that name which is now before the court and a party to these proceedings. During all that time and, indeed, until June, 1948, the hereditament was never assessed at more than 800*l.* gross value and 663*l.* rateable value. Between June, 1948, and January, 1949, the gross value has gone from 800*l.* to 3,000*l.*, 3,170*l.* and 7,230*l.*, and the rateable value from 663*l.* to 2,497*l.*, 2,853*l.* and 6,507*l.* With rates at 15s. 6d. in the £ these final figures are startling.

Before quarter sessions the valuation committee contended for the profits basis, and quarter sessions allowed that contention to prevail on the ground that the use to which this hereditament was put was unique and in the nature of a monopoly or quasi-monopoly; that in present conditions it cannot move or set itself up elsewhere; and that its rental value must reflect its profit-earning capacity.

I have no doubt that profits are an element to be taken into consideration, and the company have not contended otherwise. But if profits are alone to be considered to the exclusion of all other factors, then it is a strong proposition and may be very oppressive in its results, as, indeed, it turns out to be in this case, in my opinion.

I realize that the profits basis has been applied to public utility undertakings such as an electricity company (*Yeovil Rural District Council* v. *South Somerset and District Electricity Co., Ld.* (1)), or a waterworks (*Kingston Union Assessment Committee* v. *Metropolitan Water Board* (2)), to a public house, (*Cartwright* v. *Sculcoates Union* (3))—although the contrary view was held in *Dodds* v. *South Shields Assessment Committeee* (4)—and to a totalisator, (*Racecourse Betting Control Board* v. *Brighton Corporation* (5)); and that the court found adequate reasons for applying the profits basis in those cases.

(1) [1948] 1 K. B. 130.
(2) [1926] A. C. 331.
(3) [1900] A. C. 150.
(4) [1895] 2 Q. B. 133.
(5) [1941] 2 K. B. 287.

Until it is unlawful for trade to make profits, all cases in which the profits basis is taken for assessment for local rates should be examined with some care lest injustice, hardship, and great inequality should result. If rating authorities, whoever they may be, propose to rate according to a calculation based upon trading profits, and thus enable the rate collector to get his clutching hands into the till, so to speak, it may be that one day they will have to take into consideration not the profits of the business but the losses, and, although there may still remain a beneficial occupation to be rated, the local community, having enjoyed the advantage of the success of the venture, will be called upon to share the disadvantages of the failure. A ratepayer in occupation of refreshment rooms at a railway station has been held to be entitled to bring forward his account books to show a loss in order to obtain a reduction of his rate: see *Clark* v. *Fisherton-Angar Overseers* (1).

Suppose, for example, that, on land adjacent to and of the same acreage as this hereditament, there should be buildings of the same size and number as on this hereditament, and that an industry should be conducted there in the production of things which are manufactured in similar factories elsewhere and for which there is a general demand: it is an alarming thought that, by reason of this hereditament being a zoo and the hereditament next door a factory, the rateable value of this should be 6,507*l*. and of the neighbouring one, possibly, a far lower figure.

It was said that the use to which this hereditament was put was unique, and that there was no comparable hereditament. Yet there are a few other zoos throughout the country, and none was cited to this court as being assessed on the profits basis. If this assessment prevails, how long will it be before the same method is applied to them? How many zoos have there to be before any one ceases to be exceptional or unique?

I realize that it may well be long before Chessington Zoo has a competitor on the opposite side of the road or in the neighbourhood, and that a quasi-monopoly, whatever that may mean, is enjoyed; but it has been created by the genius of one man, and so have other industries which are not assessed on the profits basis.

What are "profits"? "Profits" may have as many meanings as "value," and everything must depend upon the

(1) 6 Q. B. D. 139.

1949

SURREY COUNTY VALUATION COMMITTEE v. CHESSINGTON ZOO LD.

Cassels J.

purpose for which profits are taken into consideration. There are gross profits as well as net profits ; there are actual profits ; there is the profit shown in a balance sheet on a profit and loss account ; there are profits assessable to income tax ; and profits available for dividend and division. Jessel M.R. in *Mersey Docks and Harbour Board* v. *Lucas* (1) said that profit assessable to income tax "is the amount got from the "property minus the cost of getting it." Another way in which it was put in the same case was "excess earnings over "expenditure." Some interesting observations on the meaning of the word "profits" were made by Fletcher Moulton L.J. in *In re Spanish Prospecting Co. Ld.* (2). I need not cite the passage at length, but the learned Lord Justice drew attention to the importance of depreciation in the value of buildings, plant and stock, and said that, though the fundamental meaning was the amount of gain made by the business during the year, this strict meaning was rarely observed in drawing up the accounts of firms or companies. These he described as domestic documents.

Where the profits basis has to be considered as an element in assessment for rating, what items are to be included in a calculation made for the purpose of ascertaining the rent which a prospective tenant would be prepared to pay for the exclusive right to attempt to earn the same profit on the hereditament ? I think that these profits should be considered at their lowest ; that nothing should be included which could reasonably be excluded both in receipts and expenditure ; that due allowance should be made for the change of personality in control, for the speculative character of the business, for the risks dependent upon times and weather if the undertaking is affected thereby, and for the fluctuating costs and difficulties of labour and material. I do not think that quarter sessions gave due and proper consideration to these items.

Speaking for myself, I should not have included in the calculation the considerable sums earned by the company in letting out animals during the course of the year. These animals earned the money away from the hereditament. Further, the prospective tenant, in making his offer to rent the hereditament, might not be considering the continuation of that side line or activity, or the landlord might not be including it in the tenancy.

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(1) (1882) 51 L. J. (Q. B.) 114, 116.

(2) [1911] 1 Ch. 92, 98.

1949

SURREY COUNTY VALUATION COMMITTEE v. CHESSINGTON ZOO LD.

Cassels J.

I would send the case back to quarter sessions with instructions to them to give further considerations to the items which I have mentioned and to leave out of their calculation of profits those profits relating to the letting out of animals.

As I am in a minority, the result is that the appeal is dismissed.

Appeal dismissed.

Solicitors: *Frere, Cholmeley and Nicholsons; Crofts & Ingram and Wyatt & Co., for Dudley Aukland, Kingston-on-Thames.*

R. P. C.

MIDDLETON v. BALDOCK (T. W.).

SAME v. BALDOCK (G. B.).

C. A.

1950

Mar. 1 *and* 2

Evershed M.R. Denning and Jenkins L.JJ.

Landlord and tenant—Rent restriction—Husband statutory tenant of matrimonial home—Desertion—Wife remaining in occupation—Separate actions by landlord against husband and wife for possession—Purported abandonment of husband of right to possession—Position of wife.

A house let to a husband on a weekly tenancy was occupied by him and his wife until he deserted her. Thereafter she remained in occupation of the house, which contained some of the husband's furniture, and paid the rent out of money received from him. Having given the husband notice to quit, the landlord brought separate actions against husband and wife for possession, as against the husband on the ground that the contractual tenancy was at an end and as against the wife as a trespasser. The husband was entitled to the protection of the Rent Restriction Acts as statutory tenant, but he filed an admission of the landlord's title and offered immediate possession. The county court judge made an order for possession against him, and in the second action made an order for possession against the wife. Having obtained from the Court of Appeal an order adding her as a defendant in the action against the husband, she appealed in both actions.

Held, that the order for possession made against the husband was without jurisdiction and was erroneous in that a landlord seeking to recover possession against a tenant protected by the Rent Restriction Acts must establish the right to possession on one of the grounds stated in the Acts, unless, after possession had been claimed on such a ground, the tenant admitted facts to support it, in which event the court need not itself investigate the matters of fact admitted; whereas the husband here could not yield possession to the landlord seeing that his wife was rightfully in possession vis-à-vis her husband, and his offer of possession was accordingly futile as being one which he was unable to perform in the absence of either the wife's consent to go out of the house or an order for ejectment against her.

Barton v. *Fincham* [1921] 2 K. B. 291, applied.

Brown v. *Draper* [1944] K. B. 309, and *Old Gate Estates Ld.* v. *Alexander*, ante, p. 311, distinguished.

Per Denning L.J. Where an innocent wife remains in occupation of a house let on a weekly tenancy to her husband and occupied by them as the matrimonial home until he deserted her, he cannot give up possession to the landlord unless he can persuade her to vacate the house or obtains from the court an order made in exercise of its discretion under s. 17 of the Married Women's Property Act, 1882, that she should go out. In a case where a husband had deserted his innocent wife and she had nowhere else to go to, no court would make such an order.

APPEALS from Bedford county court.

The plaintiff in both actions was Mrs. M. A. Middleton, the owner of No. 39 Wellington Street, Bedford, which had been let by her to Thomas Wilfred Baldock (the defendant in the first action) at the weekly rent of 15*s*. 10½*d*. The house was occupied by the husband and his wife, Gertrude Bertha Baldock (the defendant in the second action), as their matrimonial home until the husband deserted his wife on July 10, 1948. She remained in occupation of the house and in due course obtained a maintenance order against him. On September 30, 1949, the landlord gave the husband notice to quit and subsequently brought actions in the county court against him and his wife, respectively, claiming possession of the house as against him on the ground that the contractual tenancy had been determined and as against the wife as a trespasser. The action against the husband was first in the list, and when it came on application was made on behalf of the wife that she should be added as a defendant. The county court judge refused the application, nor would he consolidate the two actions. Although the husband was a statutory tenant under the Rent Restriction Acts, the landlord advanced no ground against him under the Acts for recovery of possession, but relied on the fact that he had filed an admission in the following terms: "I admit the landlord's title and her right "to immediate possession and offer to give possession forth-"with." The county court judge thereupon made an order for possession.

The action against the wife was then heard. She gave evidence that she had lived in the house with her husband and their adopted child until he deserted her, and that afterwards she continued to live there, some of her husband's furniture and tools still remaining. She also said that after he had deserted her he had for a time made her a voluntary allowance out of which she had paid the rent, and that afterwards she paid it out of maintenance which he was ordered to pay her. It was contended for the wife that she was rightly in possession of the house; that it was not open to her husband to divest himself of possession by a mere statement that he did not wish to claim protection under the Rent Restriction Acts or by a mere admission of the landlord's right to possession; and that no revocation of the wife's authority to live in the house had any legal effect. The county court judge made an order for possession against her also. In December, 1949, the wife obtained from the Court of Appeal an order joining her as a defendant in the action against the husband. She now appealed in both actions.

Heathcote-Williams K.C. and *R. Bernstein* for the wife. The action against the husband to which the wife has now been added as a party is the substantial basis of appeal. The county court judge wrongly thought that the admission filed by the husband concluded the matter, making the order for possession a mere formality; he thereby failed to apply s. 3, sub-s. 1 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, or r. 18 of the rules made under the Rent Restriction Act of 1920. As against a protected tenant the landlord had to show (*a*) that it was reasonable to order possession; and (*b*) that there was either alternative accommodation for the tenant or a ground justifying an order for possession under sch. I to the Act of 1933. The tenant's consent did not of itself relieve the landlord of that duty: *Barton* v. *Fincham* (1); *Brown* v. *Draper* (2). The latter case was applied in *Old Gate Estates Ld.* v. *Alexander* (3). The husband's filing of the "admission" could not give the court power to make an order, for the admission was not effective. The husband was offering something not in his power to give, for the possession of his wife must be regarded as his possession, as stated by Lord Green M.R. in *Brown* v. *Draper* (2). The

(1) [1921] 2 K. B. 291.
(2) [1944] K. B. 309, 314.
(3) Ante, p. 311.

wife was an innocent wife, and, as she was unwilling to yield possession, the husband had no power to make her go.

Sabin for the landlord. The wife could only be protected in her occupation of the house through her husband, and the husband had filed an admission of the landlord's title which was enough to enable the judge to make the order he made. The machinery of the Rent Restriction Acts was never invoked in favour of the wife. *Brown* v. *Draper* (1) is a long way from the present case, and Lord Greene M.R.'s dictum (2) shows that here the landlord was entitled to succeed. There has been no case in which a husband has made such an admission to the landlord. The true effect of an admission was made clear by Scrutton L.J. in *Barton* v. *Fincham* (3). The only protection under the Rent Restriction Acts is for the person in occupation. If the wife here had that protection, the husband had none: *Thorne* v. *Smith* (4).

[EVERSHED M.R. The essence of this case is that the wife is rightly in possession. While that was so the husband's admission was valueless.]

The main question is whether the wife is in a special position now that she has become a feme sole under the Married Women's Property Act, 1882.

[EVERSHED M.R. Is it any the less the obligation of the husband to provide his wife with a residence? The wife here is in occupation of the matrimonial home.]

If the tenant had allowed someone other than his wife to remain in possession, that would not have availed against the landlord. The wife's occupation is not of a different nature.

[DENNING L.J. This wife is lawfully there. In a case between an innocent wife and a deserting husband no court could give the husband relief.]

The position is different since the wife became a feme sole: *Rees* v. *Hughes* (5).

[EVERSHED M.R. That case is concerned with property.] Here interests affecting property are involved.

EVERSHED M.R. [after stating the facts]. In my judgment the order against the husband was made without jurisdiction and was erroneous. But of course the husband was in no mood to appeal against it. He had, indeed, admitted the landlord's so-called right, and the order made was, no doubt, one entirely to his own liking. Unless it could be got rid of, therefore, the wife's appeal in her own action was not likely to succeed. As she was not a party in the husband's action, she was compelled to ask this court, in the exercise of the jurisdiction which we admittedly have, to add her as a party to her husband's action and give her leave to appeal—all of which we did. The necessity for this multiplicity of proceedings is, I think, regrettable. It seems to me, as a matter of practice and commonsense, quite plain that, where it is brought to the attention of a court that there are claims for possession against a husband and wife, prima facie either those claims ought to be consolidated or both husband and wife should be made parties to one action, so that the whole matter can be tried at the same time. Had that been done in this case there would have been a great saving of trouble and expense.

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(1) [1944] K. B. 309.
(2) Ibid. 315.
(3) [1921] 2 K. B. 291, 298.
(4) [1947] K. B. 307, 315.
(5) [1946] K. B. 517.

The question now is whether the order against the husband was rightly made. In the first place, it is clearly established that a landlord seeking possession in the courts against a tenant must, if he is to obtain an order, establish that there is under the Rent Restriction Acts jurisdiction to make the order on one or other of the grounds stated in the Acts. Those numerous grounds may depend upon the proof of matters of fact, for example, that the tenant is in breach of some covenant. If the tenant, sued for possession on some statutory ground, chooses to admit in court, or by some equivalent means, the truth of the allegation on which the landlord's claim is based, then, I think, it is also established (and Scrutton L.J. so stated in *Barton* v. *Fincham* (1)) that the judge can accept the admission as sufficient to found his jurisdiction, and is not bound himself to investigate the matters of fact alleged. If it afterwards turns out that the admission by the tenant was procured by the landlord by some impropriety, then other remedies would become available for the deceived tenant. That did happen in *Thorne* v. *Smith* (2) ; but, as Bucknill L.J. there observed, if matters of fact, when proved, found the jurisdiction, the admission of the tenant of those matters of fact will give the court the requisite jurisdiction to make an order. If, again, the tenant goes out of possession altogether and delivers up the premises to the landlord, then equally

(1) [1921] 2 K. B. 291. (2) [1947] K. B. 307, 315.

there is nothing to prevent the landlord's taking advantage of that fact and going into possession. By quitting the premises the tenant takes himself out of the protection of the Acts, and therefore no proceedings are necessary against him. If some unauthorized person comes in and remains there after the tenant has effectively given up possession himself, it may be necessary for the landlord to bring an action for trespass against that person. But none of these illustrations applies to the present case: here, the actual individual in possession was the tenant's wife, and, beyond any shadow of doubt, vis-à-vis the tenant she was rightly there.

Mr. Sabin argued that since recent legislation it is no longer true to say that there is any agency in a wife, any right in her which she enjoys on behalf of her husband to be in possession of her husband's house. I do not accept that argument. It seems to me that, as the wife of the tenant—who had deserted her—this wife, beyond doubt, was entitled to be in possession and to enjoy any right which the tenant had under contract, statute, or otherwise, to live on the premises. If matters had been otherwise and the wife had wronged the husband; or, if, though she was not the guilty party, an appropriate court, on the husband's application, had ordered her to go out, then her right to be lawfully there would, of course, have come to an end. But that has not happened here: on the facts of this case, it seems to me, the conclusion inevitably follows that, since the wife was in possession, and rightly in possession, on her husband's behalf, his statement that he admitted the landlord's right to immediate possession and his offer to give it up became futile and irrelevant. The offer was one which he was quite unable to perform, and he wholly failed to perform it. The only way he could do so was by getting a court with competent jurisdiction in matrimonial matters to order his wife out or, possibly, by adopting the medieval method of taking her by the scruff of her neck and throwing her out.

As this is accordingly not a case in which possession has been effectively given up, it is necessary for the landlord to obtain an order. She can only do that if she can found herself by appropriate allegation and proof on one or other of the grounds specified in the Rent Restriction Acts. That she has not done. Mr. Sabin has suggested that the mere assertion by the landlord that she claims possession is, if admitted by the tenant, sufficient to found jurisdiction under the Acts; but, in the absence of actual possession which removes the premises altogether from the Acts, I reject that argument. It therefore follows that the document which was the foundation of the judge's order in the husband's action was wholly ineffective for any of the purposes for which it was used, and that the judge, with the knowledge which he had that the wife was, in fact, in possession as the wife of the tenant, could not properly make an order against the husband. Once that order is out of the way, it equally follows that there is no basis on which the order against the wife could be made. It follows that both orders must be set aside.

I have discussed this matter on what I consider to be the general principle to be derived from the cases cited, in partiular, *Barton* v. *Fincham* (1). But this kind of question, though the circumstances were not by any means identical, has twice been before this court recently. In *Brown* v. *Draper* (2), the first case in which this kind of point arose, a husband was the tenant. Having had disputes with his wife, he went away and left her and their child in occupation of the demised premises. He then stopped paying the rent, but did not revoke any authority that he had given, or must be taken to have given, to his wife to remain on the premises. The landlord brought proceedings against the wife alone. The county court judge made an order for possession against her, but this court set it aside. The ground on which this court primarily founded itself was the absence, as a party to the proceedings, of the tenant, that was, the husband. It was pointed out that in his absence no order that was effective could be made against the wife. Therefore, the precise point with which we are here concerned did not arise. But I am inclined to think that the reasoning of this court goes rather further than Mr. Sabin is disposed to concede, though I agree that the main basis of the judgment was the absence of the tenant.

Lord Greene M.R., delivering the judgment of the court said (3): "The county court judge appears to have held, "that, in view of the statements made by the husband in the "witness-box, his right to claim the protection of the Acts "has gone. We do not take this view. There are, we think, "only two ways by which a tenant whose contractual tenancy "has come to an end can lose the protection of the Acts. "One is, as we have stated, by giving up possession. The "other is by an order against the tenant for recovery of

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(1) [1921] 2 K. B. 291.
(2) [1944] K. B. 309.
(3) Ibid. 312.

"possession. We do not see on what ground it can be said "that a tenant who remains in possession can, by a mere "statement of his intentions and wishes in the witness-box, "in an action to which he is not a party, confer on the court "a jurisdiction of which the statute deprives it. Unless and "until the husband gives up possession the plaintiff can only "obtain possession as against him by obtaining an order, and "the power of the court to make such an order is limited by "statute." Then, after saying that a tenant remaining in possession cannot lawfully contract out of the Act, he adds: "No contract, and a fortiori, no mere statement of his "wishes or intentions, can deprive him of the statutory "protection."

So far, although there appears the important phrase "in an action to which he is not a party," I do not think that that passage bears anything like so limited a meaning as Mr. Sabin suggests. I think that Lord Greene M.R., was saying that a tenant does not put an end to his statutory right by merely asserting that he does not desire to remain in the premises and that he proposes, or is willing, to go out while his wife is still, in fact, there. Lord Greene M.R., went on: "Were the landlord now to take proceedings against the "husband to recover possession, the husband could, in our "opinion, say that he had changed his mind and that he now "wished to avail himself of the protection of the Acts." That, I think, again tends to support the view which I have stated: if a husband merely states that he is willing to give up possession at some time, he can change his mind at any moment, at any rate up to the making of an order. I am willing to assume that any change of mind after the making of an operative order would be ineffective.

One further passage at the end of the judgment undoubtedly lends colour to the view put forward by Mr. Sabin that the Master of the Rolls was at any rate not deciding what would have been the result had the facts been as they are in this case, namely, both parties being before the court and the husband then saying that he was willing to give up possession (1): "It "follows that the court has no jurisdiction to make an order "against the wife unless the husband is a party and an order "is made against him as well. If the views above expressed "are correct, they cover the present case, and the proceedings "are defective for want of parties. The action, therefore,

(1) [1944] K. B. 309, 315.

"ought to have been dismissed. It may well be that, in the "circumstances of this case, the wife will not secure any "lasting benefit from this decision since, if the landlord brings "a fresh action, making the husband a party, it may be that "the husband will submit to an order. On the other hand. "he may change his intention."

That, I fully concede, seems to suggest that if, in such a case as the present, the husband and wife were before the court in the same proceedings and the husband submitted to an order—or even if they were not in the same proceedings but the husband submitted to an order—an order might be made which would be effective and entitle the landlord also to possession against the wife. But that part of Lord Greene M.R.'s judgment was, I think, obiter. The set of circumstances which we have now to consider was not in his mind, and the passage quoted is not, therefore, authority which compels us to take the view for which Mr. Sabin has contended. Moreover, it seems to me that there is no distinction between a tenant's stating in the witness box that he is willing to give up possession and his writing it on a piece of paper and allowing the landlord to prove it.

The second case, *Old Gate Estates Ld.* v. *Alexander* (1), came before this court last year. There the landlords had examined with some care the decision of this court in *Brown* v. *Draper* (2) and had attempted to marshal their forces in accordance with Lord Greene M.R.'s observations. But they were defeated by a change of mind on the tenant's part, though I do not say that they would not have otherwise been defeated. There the tenant was living with his wife in the demised premises. They quarrelled, the tenant left the matrimonial home, and then purported to surrender it by a written agreement. His wife remained on with the furniture. He then, at the behest of the landlords, signed a further document purporting to revoke the wife's authority to remain on. The landlords thus had two quite elaborate documents, in one of which the tenant said that he was willing to give up possession, that he did not resist their claim, and indeed, without any foundation of fact, that he handed back the key. In the other, addressed to his wife, he said: "Please take this "as formal notice of the revocation of any authority or leave "which I may have at any time granted or given to you "to occupy the said flat." Armed with those documents

(1) Ante, p. 311. (2) [1944] K. B. 309.

the landlords thought that their position was a strong one. But husband and wife came together again, and, when the action came on, there they were both in possession, the husband having entirely changed his mind. This court held that he was entitled to remain.

Because of those peculiar facts, that case, again, is not a direct authority governing the present; but in my judgment it goes a stage further along the road trodden earlier by *Brown* v. *Draper* (1), and lends very strong support to the views which I have expressed. Bucknill L.J., after referring to the passages from *Brown* v. *Draper* which I have already read, said this (2) "It appears to me that the passages which I have read "are appropriate to the present case because, in the first "place, the husband did nothing towards removing the "furniture in the flat, and so long as it was there he retained "possession to that extent. It was not open to the landlords "to let the flat unfurnished while the furniture was there and "the husband had done nothing at all to attempt to remove it, "nor do I think that he could remove his wife. It is not "suggested that he could remove her otherwise than by "breaking the law and forcibly carrying her out. It is not "necessary for this court to decide whether he could lawfully "revoke his permission for her to live there, but, in the absence "of circumstances showing that she was in the wrong and "had forced him to leave her, I should doubt whether the "revocation of permission to an innocent wife to occupy the "matrimonial home in which the husband had lived with her "and from which he had deserted her would have any valid "legal effect."

Then Somervell L.J. said (3): "The wife still remained "in the house and the furniture remained in the house, "and it is, in my view, unnecessary to decide in this case "what would be the position—and it is a somewhat unlikely "one—if a husband succeeded in clearing the house of "furniture, his wife insisted on remaining in the unfurnished "house, and he then gave to the landlord a revocation "of the licence to his wife. That question can be determined "when it arises and it might turn on the question whether "the landlord accepted that position as a proper surrender. "But the furniture's being left in the house seems to me "in itself sufficient to prevent the defendant in this action "from being able to establish that possession was surrendered."

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(1) [1944] K. B. 309.

(2) Ante, p. 317.

(3) Ante, p. 319.

C. A.
1950
MIDDLETON v. BALDOCK (T. W.).
SAME v. BALDOCK (G. B.).
Evershed M.R.

Finally, my brother Denning observed (1): "The reason "[for not giving possession] is because the wife, so long as she "is behaving herself properly, has a very special position in "the matrimonial home. She is not the sub-tenant or licensee "of the husband. It is his duty to provide a roof over her "head. He is not entitled to tell her to go without seeing "that she has a proper place to which to go. He is not "entitled to turn her out without an order of the court: see *H.* v. *H.* (2). Even if she stays there against his will, "she is lawfully there; and so long as she is lawfully there "the house remains within the Rent Restriction Acts after "he leaves, just as it does after he is dead. She can pay the "rent and perform the obligations of the tenancy on his behalf "and the landlord can only obtain possession if the conditions "laid down by the Acts are satisfied."

Mr. Sabin contended that those last observations went further than was warranted by the law. It may be that some argument to that effect could be effectively addressed to the court, and will be hereafter; but it is unnecessary to say any more on that topic in the present case, for here not only was there still the husband's furniture, but there is no attempt to show, so far as I can see, that there has been any revocation, or even attempted revocation (except perhaps by inference) of the wife's right to remain in the matrimonial home. If that is so, then, it seems to me, the principle in *Old Gate Estates Ld.* v. *Alexander* (3) covers the present case. As at present advised, I wholly associate myself with what Denning L.J. there said, though it may be that is going further than is strictly necessary for the decision of this case.

Mr. Sabin argues that it is not right that the county court judge, when determining possession cases, should have to be involved in the trial of matrimonial disputes. But in practice I doubt whether difficulties of the formidable nature suggested would in fact be experienced. If both husband and wife are before the court, in the great majority of cases real difficulty will not arise. But, whether or not such difficulties may arise in some cases hereafter, they certainly do not, in my judgment, arise here, for it is plain that, on the evidence, this husband had deserted his wife and that she is rightly still in possession. There has been no effective revocation of any licence that she had, and the husband's furniture in part also remains in the house.

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(1) Ante, p. 319.
(2) (1947) 63 T. L. R. 645.
(3) Ante, p. 311.

For all those reasons, I am clear that the order made in the husband's action was wrongly made, and that it must be set aside. It follows that the order made in the wife's action must also go. In the result I think that the appeals in both actions should be allowed and that both claims by the landlord should have been dismissed.

DENNING L.J. The protection of the Rent Restriction Acts is a personal privilege of the tenant which ceases when he goes out of occupation. A sub-tenant to whom a part of the premises has been lawfully sublet is protected by a special provision of the Act; but, apart from that provision, the privilege ceases when the tenant goes out of occupation. The tenant in this case, however, never went out of occupation. He left his wife there, and he had no right to turn her out. Even if she stayed there against his will, he could not turn her out. Mr. Sabin says that husband and wife are no longer one in law. That is true, but there is still a special relationship between them which is recognized and regulated by the law; and one of the features of that relationship is that the husband cannot sue his wife for a tort. He cannot sue her, for instance, in ejectment or in trespass. He cannot as of right turn her out of the matrimonial home, even if he is the owner or the legal tenant of it. All he can do is to make an application to a court under s. 17 of the Married Women's Property Act, 1882, and ask the court in its discretion to order his wife out: see *Bramwell* v. *Bramwell* (1), per Goddard L.J., and *H.* v. *H.* (2). In a case of the present kind, where the husband has deserted his wife and she has nowhere else to go, no court would order her out. She is therefore lawfully there, and, so long as she remains lawfully there, he remains in occupation by her. If he desires to cease to be in occupation—and to cease to be responsible for her occupation—then he must go to the court and persuade it, if he can, to order her out. But until that time arrives she is lawfully there, and she can claim in his right, even against his will, to be there. The landlord can only get possession if the rent is unpaid or some other condition of the Acts is satisfied entitling him to possession. I agree with all that my Lord has said, and that the appeal should be allowed.

(1) [1942] 1 K. B. 370, 374. (2) 63 T. L. R. 645.

JENKINS L.J. I also agree. The wife's claim in this case depends entirely on her being able to claim in right of her husband the protection accorded to him as a statutory tenant. The question in the case, therefore, comes simply to this: has the husband's interest as statutory tenant been determined or not? If, instead of the action against the husband in which he submitted to an order for possession, there had been nothing more than an agreement out of court, either in the form of a notice to quit accepted by him or in the form of a purported surrender given by him, it would, I think, be plain, on the principles stated in *Brown* v. *Draper* (1) and in *Old Gate Estates Ld.* v. *Alexander* (2), that the husband's interest as a statutory tenant had not been effectively determined, in that he had never actually given up possession of the premises but had remained in possession of them through his wife. This case, however, does differ from those two cases in that here there has been an order of the court against the husband for possession of the premises. Was that an order which the county court judge ought to have made or had jurisdiction to make under the Rent Restriction Acts? In my judgment, it is reasonably plain that the judge ought not to have made that order and had no jurisdiction to make it.

This matter was discussed at length in *Barton* v. *Fincham* (3), and was also discussed in *Thorne* v. *Smith* (4). I think that the principles deducible from those cases are these: under the Acts the court only has jurisdiction to order possession on one or other of the specified statutory grounds. It is not, however, always obliged to hear a case out; for, if the tenant appears and admits that the landlord is entitled to possession on one of the statutory grounds, the court may act on that admission and make the appropriate order. Again—and this, I think, is an extension of what I have just said—if there is a representation made by the plaintiff landlord to the defendant tenant to the effect, for instance, that the landlord wants the premises for his own occupation—which is one of the ingredients of a ground on which possession may be ordered—and the tenant accepts that representation and on that footing submits to an order, then the order can validly be made, subject to the possibility that, in the event of the representation turning out to have been false, the efficacy of the order may be destroyed. But in my judgment the court cannot go

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(1) [1944] K. B. 309.
(2) Ante, p. 311.
(3) [1921] 2 K. B. 291.
(4) [1947] K. B. 307.

C. A.

1950

Middleton v. Baldock (T. W.). Same v. Baldock (G. B.).

Jenkins L.J.

further than that and exercise a general jurisdiction to make a consent order without inquiry or investigation simply because the tenant appears in court and says : " I consent to an order," or says in the witness box that he does not contest the landlord's right. I think that that necessarily follows from the principle that possession can only be ordered on one or other of the statutory grounds and that the tenant cannot waive the statutory protection by agreement.

This passage from the judgment of Scrutton L.J., in *Barton* v. *Fincham* (1) bears on that point: " We were asked to " order a new trial, apparently that an attempt might be made " to bring the case under s. 5, sub-s. 1 (*c*) "—that being the sub-section concerned with the case where a tenant has given notice to quit—" but the landlord had not put the case forward " in his particulars or apparently in his argument, and there " are no findings of fact relevant to the case. The point being " fought was the effect of the agreement. It was urged that " the effect of our decision "—that was that the tenant could withdraw from the agreement—" would be to prevent agree-" ments in court. If the tenant is willing to go out, I do not " see why any order is wanted ; let him go ; but as at present " advised I do not see any reason why the judge on being " satisfied that a tenant is then ready to go out (not that he " was once willing but has changed his mind) should not make " an order for possession." I refer to that passage because it looks at first sight as though the learned Lord Justice were saying that in any case in which the tenant appears and expresses his willingness to go out forthwith the county court judge can properly make an order by consent without any investigation whatever. In my judgment, the Lord Justice did not mean that, and when he said, " on being " satisfied that a tenant is then ready to go out," it seems to me, he clearly must have meant " on being satisfied that the " tenant is then ready to go out and is able to give possession."

I think that his observations must be limited at least to that extent. So limited, they do not conflict at all with the conclusion arrived at by my brothers in this case, with which I agree ; for if the judge had made any investigation at all of the position, as, indeed, he was invited to do by the wife's solicitors before the case against the husband came on, I think that he would inevitably have come to the conclusion that the husband's admission of the landlord's right and his expression

(1) [1921] 2 K. B. 291, 298.

of willingness to go out of possession were wholly idle inasmuch as the house was occupied by his wife whom, so far as could be seen, he had no means of ejecting.

C. A.
1950

Middleton v. Baldock (T. W.).

Same v. Baldock (G. B.).

For these reasons I agree that the order for possession made against the husband should be set aside and the wife's appeal allowed.

Appeals allowed.

Solicitors: *Gregory, Rowcliffe & Co., for Halliley & Morrison, Bedford; E. W. Long & Co., for Burgess & Cheshire, Bedford.*

H. C. G.

SOLLE *v.* BUTCHER.

C. A.
1949
Oct. 24, 25, 26.
Nov. 25.

Bucknill, Denning and Jenkins L.JJ.

Landlord and tenant—Rent restriction—Standard rent—Common mistake—Estoppel—Rescission—Common mistake as to basis of standard rent.

The plaintiff, a surveyor, and the defendant were in 1947 partners in the business of estate agents. In 1931, a dwelling-house had been converted into five flats, and in 1938 flat No. 1 was let to a tenant for three years at an annual rent of 140*l.*, the demise making no mention of a garage, though the tenant was entitled to the use of one of the five garages serving the flats. In 1947, the defendant took a long lease of the building, which contained the five flats, then standing unoccupied, with the intention of repairing the damage done to them by a land mine, and doing substantial structural and other alterations to the flats. The plaintiff and the defendant had conversations about the rents to be charged for the flats after the works had been completed, the plaintiff informing the defendant that he could charge 250*l.* a year rent for flat No. 1 and that that rent "was "clear," that was, unaffected by any previous rent by virtue of the Rent Restriction Acts. Both the plaintiff and the defendant were satisfied that the rent of 140*l.* a year in 1938 did not apply as the standard rent. The defendant said that he relied on the plaintiff on the subject of the rents and that he did not take any steps to calculate the additions to the 140*l.* permitted on the assumption that it was the standard rent, by virtue of the work done at the flat: see s. 7, sub-s. 4, of the Rent and Mortgage Interest (Restrictions) Act, 1938. Those permitted additions would have brought the standard rent of flat No. 1, to about

C. A.
1950
SOLLE
v.
BUTCHER.

250*l.* a year. Flat No. 1 was let by the defendant to the plaintiff by a lease as from September 29, 1947, for a term of seven years at an annual rent of 250*l.*, the demise including a garage. Once this lease was executed, no notice of intention to increase the rent could be given under the Rent Restriction Acts of 1920 and 1923 during the contractual tenancy.

The plaintiff sued the defendant in the county court, alleging that the standard rent of the flat was 140*l.* a year and claiming recovery of the amount of rent over that figure which he had paid. The defendant alleged that he had relied on the plaintiff's oral assurance that the rent was not controlled by any previous letting, and pleaded (1.) common mistake of fact, (2.) innocent material misrepresentation, and (3.) estoppel, and he claimed rescission of the lease. The judge found that, after the alterations, the flat had not become a new and separate dwelling-house; that the flat let in 1938 for 140*l.* a year retained its identity, and, accordingly, that this sum was the standard rent. He held further that there was no common mistake of fact made by the parties, though possibly there was one of law since both parties imagined that the Rent Restriction Acts did not apply. He held also that the plea of estoppel was no defence against the provisions of the Rent Restriction Acts. Accordingly, he made a declaration that the standard rent of the flat was 140*l.* and an order for the recovery of the amount of rent overpaid. On appeal, the court having agreed with the judge on the issue of fact that the flat had not lost its identity by reason of the alterations which had been made to it, held that the standard rent of the flat was 140*l.*, applying on the question of the garage being included in the lease of 1947, *Langford Property Co. Ld.* v. *Batten* (1949) 65 T. L. R. 577.

(1.) On the issue of common mistake:

Held, that the lease must be set aside: by Bucknill L.J., on the ground that both parties having, in his opinion (contrary to that of the county court judge) addressed their minds to the question whether the flat had changed its identity, the mistake which each had made was that the work done made such a substantial alteration to the building as to make it a different flat—a common mistake of fact; and by Denning L.J., on the ground that the parties had executed the lease under a common mistake in that each thought that the flat was not tied down to the controlled rent of 140*l.* a year, whereas in fact it was.

Per Denning L.J. A contract was liable in equity to be set aside, if the parties were under a common misapprehension either as to the facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault: see *Lansdown* v. *Lansdown* (1730) Mos. 364; 2 Jac. & W. 205; *Bingham* v. *Bingham* (1748) 1 Ves. Sen. 126; and *Cooper* v. *Phibbs* (1867) L. R. 2 H. L. 149 at p. 170. The last-mentioned case showed that rescission was available even after an agreement of tenancy had been executed and partly performed. The observations in *Seddon* v. *North Eastern*

Salt Co. Ld. [1905] 1 Ch. 326, had lost all authority since Scrutton L. J., threw doubt on them in *Lever Brothers Ld.* v. *Bell* [1931] 1 K. B. 557, 588; and the Privy Council actually set aside an executed agreement in *Mackenzie* v. *Royal Bank of Canada* [1934] A. C. 468. The decision in *Angel* v. *Jay* [1911] 1 K. B. 666, that an executed lease could not be rescinded for an innocent representation was wrong. In *Wilde* v. *Gibson* (1848) 1 H. L. C. 605, Lord Cambell's statement that an executed conveyance could be set aside only on the ground of actual fraud must be taken as confined to misrepresentation as to defect of title on the conveyance of land.

Jenkins L.J., dissenting, supported the decision of the county court judge. The common mistake made by the parties that on the relevant facts, all of which were known to them, the Rent Restriction Acts did not have the effect of making 140*l.* the standard rent of the flat was a mistake of law. And this was so whether it was due to a failure to appreciate and apply the test of identity or proceeded from an application of that test, followed by an erroneous inference or opinion, drawn from the facts, that the flat was not the same dwelling-house as the flat let at an annual rent of 140*l.* The mistake, being one of law, merely as to the effect of the statutes on the contract made, was no ground for rescission.

(2.) On the issue whether the grant of the lease by the defendant was induced by an innocent material representation by the plaintiff, on which the county court judge had made no specific finding, Bucknill L.J., and Jenkins L.J., held that they were not satisfied that the plaintiff had made any specific misrepresentation of fact to the defendant such as would entitle the defendant to rescind the contract.

Per Jenkins L.J. The expression of an opinion, bona fide held on a question of law, is not misrepresentation. Further, it had been repeatedly held that an innocent misrepresentation afforded no sufficient ground for rescission after completion, and there was authority for the view that this applied to a lease no less than to a conveyance: see *Angel* v. *Jay* [1911] 1 K. B. 666, and the cases there cited. Doubts had of recent years been expressed as to the validity of the principle; but he was not prepared to hold that it was no longer law.

Per Denning L.J. There was much to be said for the view that the grant of the lease was induced by innocent material misrepresentation; but it was unnecessary to come to a firm conclusion on that issue. The fact that the lease was executed was no bar to the relief of rescission either in the case of common misapprehension or in that of innocent material misrepresentation and, in his opinion, *Angel* v. *Jay* (supra) on this issue was wrongly decided.

(3.) On the issue whether the plaintiff was estopped from claiming the benefit of the Rent Restriction Acts, the court was unanimous in holding that, just as the parties could not contract out of those Acts, so they could not defeat their provisions by estoppel. Just as the plaintiff could have claimed the benefit of the Rent Restriction Acts even if he had expressly agreed not to do so, he could not be precluded from claiming that benefit by words or conduct, not amounting to an express promise not to do so, but, in effect, implying such a promise. No rule of estoppel could oust the court's jurisdiction to decide whether the rent claimed for a dwelling-house infringed the provisions of the Acts. *Welch* v. *Nagy*, ante, p. 455, applied.

Per Denning L.J. Where a landlord let a flat with a standard rent, as on this occasion, with the addition of a garage, it did not follow that the tenant obtained the benefit of the garage for nothing. It was probable that the landlord was entitled to raise the rent: see sub-s. 3 of s. 2 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and *Seaford Court Estates Ld.* v. *Asher* [1949] 2 K. B. 481.

Accordingly it was held that, by reason of common mistake of fact, the lease must be set aside on terms (see infra), and those terms would be such as would enable the plaintiff to stay on at the proper rent or to leave.

Garrard v. *Frankel* (1862) 30 Beav. 445, and *Paget* v. *Marshall* (1884) 28 Ch. D. 255, followed.

APPEAL from Bromley county court.

In 1947, the plaintiff, Godfrey Frank Solle, a surveyor, became a partner with the defendant, Charles Butcher, in a business of estate agents styled Godfrey and Charles. At about that time, the plaintiff introduced the defendant to the representative of the head lessor of Maywood House, Beckenham. This dwelling-house was converted into five flats in 1931, and in 1938 flat No. 1 was let to one Taylor for three years at an annual rent of 140*l*. There was a room at the north-west corner of the flat, a part of the main building, which formed a garage. Taylor's lease contained no mention of a garage, but evidence was given by the landlord that Taylor had the right to use a garage. In 1947 the flats were unoccupied, a land mine having exploded near them during the war and done them considerable damage. In 1947 the defendant took a long lease of the house containing the five flats with the intention of repairing the war damage and carrying out substantial alterations to the flats. The defendant was the managing director of a building company which carried out the works at the flats. The plaintiff arranged the finance of the undertakings and negotiated with the rating authorities as to the new rateable values of the flats, and it was his work to let the flats. The plaintiff and the defendant had conversations as to the rents to be charged for the flats after the works had been completed. According to the plaintiff, he said, on the question of the standard rent: "Be careful because the "flats may be within the Rent Acts"; and the defendant said that he would obtain legal advice on that. Later the plaintiff presented to the defendant counsel's opinion which was not produced in court. It appeared from the evidence of the defendant that both he and the plaintiff were satisfied that the rent of 140*l*. in 1938 did not apply as the standard rent. The defendant said that he relied on the plaintiff on this subject of rents and that he did not take any action to calculate the permitted additions to the standard rent in respect of the improvements and structural alterations at the flats (see s. 7, sub-s. 4 of the Rent and Mortgage Interest (Restrictions) Act, 1938). It was stated that because of the works at the flat the permitted increases might have brought the total permitted rent of flat No. 1 to about 250*l*.

The defendant spent 6,420*l*. for repair of war damage and about 1,000*l*. on other alterations and substantial decorations of the five flats. So far as flat No. 1 was concerned, he cut away two broken walls, that at the south end of the main bedroom and that at the north end of the living room, and a transverse brick wall between them where there was a passage and a cupboard. The weight of the structure overhead was taken by steel joists, and some underpinning was done in the cellar below. As a result, space was subtracted from the bedroom and incorporated in the living room so as to form part of a dining recess in the latter. This was a substantial alteration and the work was difficult and expensive. Some wooden partitions were put up in a second bedroom to make a small box-room, and two cupboards were placed in a third bedroom. Three or four electric fires were put in and the hot-water system throughout the building was improved.

Flat No. 1 was let by the defendant to the plaintiff from September 29, 1947, for a term of seven years at a yearly rent of 250*l*. In the lease the garage was expressly included. Once this lease was executed no notice of intention to increase the rent could be given under the Acts of 1920 and 1923 during the contractual tenancy.

Relations between the parties having deteriorated, the plaintiff sued the defendant in the county court, alleging that the standard rent of flat No. 1 was 140*l*. and claiming recovery of the amount of rent which he had overpaid. The defendant by his defence alleged that he granted the lease to the plaintiff on his oral assurance that the rent of 250*l*. was in no way controlled by any letting of the flat before it suffered war damage. He denied that the premises were controlled by virtue of any "pre-war damage" letting. In the alternative, the defendant contended that the plaintiff was estopped by his conduct from asserting that any such control relieved him of his personal obligation to pay the rent of 250*l*. By way of counterclaim, the defendant asserted that the lease was entered into in circumstances amounting to a common mistake of fact, and he asked for rescission of the lease.

The county court judge, Sir Gerald Hurst, K.C., who preferred the evidence of the defendant when it was in conflict with that of the plaintiff, gave judgment for the plaintiff, making a declaration that the standard rent of flat No. 1 was 140*l*. He said: "I find that there was no mistake of fact—"possibly a mistake of law—in that both parties for some "obscure reason imagined that the Rent Acts did not apply. "I do not think they ever addressed their minds to the material "issue of identity." He held also that the plea of estoppel was no defence against the provisions of the Rent Restriction Acts. He made an order for the recovery of the amount of rent overpaid, 137*l*. 10*s*. 0*d*. The defendant, the landlord, appealed.

The relevant questions for the court were: (1.) whether on the facts of the case the county court judge was right in finding that the standard rent of the premises was 140*l*. a year; if so (2.) whether the landlord was right in his contentions that he was entitled to a rescission of the lease on the ground of (*a*) common mistake, or (*b*) innocent material misrepresentation by the plaintiff; and (3.) whether the tenant was estopped from claiming the benefit of the Rent Restriction Acts.

Levy K.C. and *Alan Campbell* for the defendant (the landlord). The county court judge, in finding that flat No. 1 was in substance the same flat which had been let in 1938 for 140*l*. a year and had not lost its identity, misdirected himself. He did so first in citing *Ellis and Sons Amalgamated Properties Ld.* v. *Sisman* (1) as being material on the issue, and secondly in stating that the transfer of the recess from the bedroom into the dining room, "simply a question of moving the partition," was not fundamental but a very minor operation. That is

(1) [1948] 1 K. B. 653.

the way in which he described the removal of two walls and the carrying of the structure overhead by steel joists, with some under-pinning. That description of what was done was a travesty of the facts. *Ellis's* case (1) was immaterial to the question under consideration. The point in that case was that a contractual tenant can, so long as the contract of tenancy remains in force, claim to be tenant of any buildings erected on the land let to him, whereas if he is a statutory tenant his rights depend on the continued existence of that dwelling-house to which his statutory rights were attached: see *Simper* v. *Coombs* (2) and *Denman* v. *Brise* (3). All the evidence showed from the considerable alterations made that the former flat let at 140*l.* a year had lost its identity: this was a new flat which had been built. The considerable cost of these alterations is a most material consideration on this issue: see the judgment of Lush J. in *Darrall* v. *Whitaker* (4). It is said that this issue is one of fact, but it is rather one of law, being the proper inference from admitted facts. There was no evidence to support the inference drawn by the county court judge: see *Phillips* v. *Barnett* (5). Whether the inference drawn by the judge was a possible inference from the facts was a question of law: see *Stockham* v. *Easton* (6); *Concannon* v. *Beardshaw* (7); and *Marchbank* v. *Campbell* (8). No doubt the fact that a garage was included in the lease of 1947 was not conclusive: *Langford Property Co., Ld.* v. *Batten* (9); and *Hemns* v. *Wheeler* (10); but this fact must be taken into consideration with the important structural alterations made to this flat at considerable cost. In *Hemns* v. *Wheeler* (10) Tucker L.J. said: "I desire to make it plain that I am not saying that the "addition of a piece of land in connexion with the structural "alterations and improvements is not a relevant matter to "be taken into consideration . . . . on the issue of fact as to "the identity of the dwelling house."

The defendant is entitled to have the lease of 1947 to the plaintiff rescinded, first, on the ground of common mistake. The judge has found that each party made the same mistake: there was a common mistake presumably that this flat was not

(1) [1948] 1 K. B. 653.
(2) (1948) 64 T. L. R. 131.
(3) [1949] 1 K. B. 22.
(4) (1923) 92 L. J. (K. B.) 882.
(5) [1922] 1 K. B. 222.
(6) [1924] 1 K. B. 52.
(7) [1940] I. R. 243.
(8) [1923] 1 K. B. 245.
(9) (1949) 65 T. L. R. 577.
(10) [1948] 2 K. B. 61, 67.

the same flat as that existing in 1938 which was let at 140*l.* a year. They were also mistaken, and there was complete misapprehension, about their respective rights: *Cooper* v. *Phibbs* (1), see the judgment of Lord Westbury. The lease, therefore, is voidable in equity. The plaintiff in cross-examination admitted that he was now taking advantage of the common mistake which had been made.

It is also voidable on the ground that the plaintiff made a material innocent representation to the defendant that the rent of flat No. 1 was not controlled by any previous rent. That induced the plaintiff to grant him this lease of flat No. 1 in 1947 at the rent of 250*l.* without calculating the permitted additions to 140*l.* a year which would have allowed him to grant a lease at the same rent, which could not have been reduced.

By reason of this representation, the plaintiff is estopped from saying that the rent is not 250*l.*: see Halsbury's Laws of England (2nd ed.), vol. 13, at p. 400, para. 452, and *Canada and Dominion Sugar Company Ld.* v. *Canadian National (West Indies) Steamships Ld.* (2).

[BUCKNILL L.J. Can you set up estoppel based on an expression of opinion? DENNING L.J. Estoppel must be based on a representation of fact.]

The claim here is based on the words and conduct of the plaintiff.

[DENNING L.J. referred to *Robertson* v. *Minister of Pensions* (3).]

[*W. H. Brakspear and Sons, Ld.* v. *Barton* (4) was also referred to.]

Comyn for the plaintiff. There was abundant evidence on which the county court judge could find that flat No. 1, as it stood in 1938, had not lost its identity. These were war-damaged premises, and the main work on them was re-instatement. The extra money spent was merely to make the same flat more luxurious, and this was merely incidental to the war-damage repairs. The garage was voluntarily included in the demise, and the evidence showed that in 1938 the tenant of this flat had the use of a garage. The fact that the garage was then separately let makes no difference: *Mann* v. *Merrill* (5). The question was one of fact for the county court judge:

(1) (1867) L. R. 2 H. L. 149.
(2) [1947] A. C. 46.
(3) [1949] 1 K. B. 227.
(4) [1924] 2 K. B. 88.
(5) (1945) 61 T. L. R. 355.

C. A.

1950

SOLLE
v.
BUTCHER.

Mitchell v. *Barnes* (1), and he did not misdirect himself on any material point.

[BUCKNILL L.J. We need not trouble you further on this point, except possibly on the question of the garage being included in the demise.]

The garage did not render this flat a different flat: *Langford Property Co. Ld.* v. *Batten* (2). The garage in the present case was contiguous and adjacent to flat No. 1: see also *Hemns* v. *Wheeler* (3).

There was here no mistake of fact made by either party: the mistake was merely one of opinion. The facts were well known to both parties, and on those facts each arrived at a conclusion as to what was the law applicable to those facts. That conclusion was erroneous; but that is not a mistake of fact. Again, this is an executed lease, and there can be no rescission of a lease with the effect that the provisions of the Rent Restriction Acts are negatived. By this means a tenant could be deprived of possession contrary to the strict requirements of those Acts, and in any case there could be no restitutio in integrum.

There was no misrepresentation—it is not suggested that there was fraudulent representation—which induced the defendant to let this flat to the plaintiff at a rent of 250*l*. Neither can it be said that the plaintiff is estopped from saying that the rent of flat No. 1 was not 250*l*. Just as there is express provision that the parties cannot contract out of the Rent Restriction Acts, so their provisions cannot be defeated by estoppel. No rule of estoppel can defeat the jurisdiction of the courts to decide what is the standard rent of a dwelling-house. Both rescission and the doctrine of estoppel are contrary to the policy of the Rent Restriction Acts.

Levy K.C., in reply. If the contentions for the defendant are correct, the court is powerless to remedy a gross injustice. Is it suggested that there is no power to rescind an executed lease, even where there is—what has not been suggested here—fraud? There was here a fundamental mistake of fact common to both landlord and tenant, as the result of which this lease was granted to the plaintiff. The common mistake of fact was that this flat had become a new and reconstituted dwelling-house and that the flat of 1938 had vanished. Alternatively, the plaintiff made the representation to the defendant that

(1) Ante, p. 448.

(2) 65 T. L. R. 577.

(3) [1948] 2 K. B. 61.

C. A.

1950

SOLLE
v.
BUTCHER.

this rent of 250*l.* was unaffected by the previous rent of flat No. 1. The defendant swore that he relied on the plaintiff's statement on this matter of the rent. Accordingly, the lease should be rescinded. No doubt this can be done on terms, on a suitable undertaking being given by the defendant to the plaintiff for a new lease to enable him to stay on at a proper rent or to quit. The defendant is willing to grant the plaintiff another similar lease provided that the rent is based on the standard rent plus all permitted increases.

Cur. adv. vult.

Nov. 25. The following judgments were read :—

BUCKNILL L.J. On the first issue, whether this was the same building after these alterations had been made, I find a statement in Megarry on the Rent Acts (4th ed.), at pp. 27–28, which appears to me to sum up correctly the various decisions on the point. The author refers to a general principle that, "if a house within the Acts is subjected to such 'sub-" 'stantial structural alteration' that it becomes 'a new and " 'separate dwelling-house in fact,' by reason of change of " identity, the new premises shed all the attributes of the old."

On this issue the judge in his judgment said: "The " defendant's case is that the flat was gravely injured in 1940, " and has since been so restored, altered and reconstructed " as to destroy the identity of the dwelling-house—this is " a question of fact. The alterations leave the outside and " the cubic capacity of the house unchanged. They are not " such as to increase the lettings or to accommodate more " people. The boxroom is of slight importance. If the house " had been damaged by enemy action the tenant would have " claimed that the flat was still the same: *Ellis and Sons* " *Amalgamated Properties Ld.* v. *Sisman* (1). These altera-" tions fall short of satisfying the test. The plans almost " speak for themselves. The only changes in structure are " (*a*) boxroom (a mere utilization of space); (*b*) two cup-" boards; (*c*) fireplaces; (*d*) transfer of recess from bedroom " into dining room—simply a question of moving the partition " not fundamental—very minor. Landlord claims he spent " 1,200*l.* It is clear he spent about 1,000*l.* on minor altera-" tions and on substantial decorations and amenities. It

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(8) [1948] 1 K. B. 653.

" still remains the identical dwelling-house, although decorated " and beautified. Therefore 140*l*. is the standard rent."

Mr. Levy on behalf of the defendant argued that the judge misdirected himself in at least two important particulars: Firstly, the case of *Ellis and Sons Amalgamated Properties Ld.* v. *Sisman* (1) had no bearing on the present point. That case concerned the right of the tenant of a house demolished by enemy action to claim his rights as a tenant of any building on the land unless those rights had been terminated by notice. The second alleged misdirection was in saying that the expensive and difficult task of removing brick walls and making the dining recess was simply a question of moving the partition. Although there is force in these contentions of Mr. Levy, the ultimate question which this court has to decide is whether the work done, which I have mentioned, was of such a nature as to come within the general principle to which I have referred. It seems to me that in all essential respects this flat was the same as the flat which was let to Taylor in 1937.

On this issue there is, however, one other point to which I must refer, and that is the question of the garage. There is a room in the north-west corner of the flat, part of the main building and next to the maid's room. This room formed a garage at the time when Taylor took the flat, but his lease makes no mention of any garage. It appears from the evidence of one Burnell and also of his wife, who granted the lease to Taylor, that it had been the practice for years to include the right to use the garage by the tenant of the flat. Burnell in his evidence said: " I think Taylor had a car. " Not certain whether he used the garage, but could have used " it if he wanted it. Five garages, and each tenant also held " a garage, although garage not mentioned in their agreements. " The garage went with the flat." In the lease granted to the plaintiff by the defendant there is a special demise of the garage apportioned to the flat. It was argued by Mr. Levy that the fact that the plaintiff had this demise of the garage tended to strengthen his argument that the property demised to the plaintiff was substantially different from the property demised to Taylor. The point was taken before the judge, who dealt with it in this way: " The fact that the letting of " the flat in 1938 did not, at any rate, in terms include the " garage is immaterial, if the identity of the flat is essentially

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(1) [1948] 1 K. B. 653.

C. A.
1950
SOLLE
v.
BUTCHER.
Bucknill L.J.

"unchanged. It may well be that the garage did not form "part of the original letting. It was not proved to my satisfaction that it was included. It is left as an open matter."

It seems to me that on this point this court must follow the decision of the Court of Appeal in *Langford Property Co. Ld.* v. *Batten* (1). In that case a flat which came within the Act of 1939, was let at 135*l.* a year in 1939, and a garage in the vicinity of the flat was let to a different tenant at 5*s.* 0*d.* a week. In 1946 the flat and the garage were let by a single lease at a rent of 175*l.* a year. In proceedings to determine the standard rent of the premises it was held that the garage fell to be treated as part of the dwelling-house, and accordingly the standard rent of the dwelling-house, including the flat and garage, was 135*l.* a year. On this point, whilst recognizing that this court was bound by the decision of the Court of Appeal in *Langford Property Co. Ld.* v. *Batten* (1), Mr. Levy relied upon a passage in the judgment of Tucker L.J., in *Hemns* v. *Wheeler* (2), where the same point was considered as arose in the *Langford Property* case (1).

Tucker L.J. said (3): "The dwelling-house remains the same, "and it is, in my view, erroneous to say that this dwelling-"house was not let in August, 1914, merely because a piece "of land has been added. Looked at in this way, *Vaughan* "v. *Shaw* (4), and *R. & P. Properties Ld.* v. *Baldwin* (5), "cited by Mr. Blundell, do not, I think, really afford us any "assistance. For these reasons I think that this appeal "fails; but, in so deciding, I desire to make it plain that I am "not saying that the addition of a piece of land in connexion "with structural alterations and improvements is not a relevant "matter to be taken into consideration, as I think it was by "the county court judge in the present case, on the issue of "fact as to the identity of the dwelling-house." It seems to me that on the particular facts of this case the demise of this garage had no material effect upon the identity of the flat. In my judgment, therefore, the judge here was right in his conclusion that the standard rent of this house is 140*l.* a year, plus such additions to the rent as the landlord would be entitled to make under the Acts in respect of improvements and structural alterations to it.

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(1) 65 T. L. R. 577.
(2) [1948] 2 K. B. 61.
(3) Ibid. 67.
(4) [1945] K. B. 400.
(5) [1939] 1 K. B. 461.

The next question is whether in all the circumstances this court should order a rescission of the contract on the ground of common mistake of fact. The importance of this point to the parties is very considerable. The lease in question is for seven years from September 29, 1947, and if the rent is to be solely the standard rent of 140*l*., then the defendant will be debarred from recovering as rent those increases of rent permitted under the Act of 1920 or s. 7, sub-s. 4 of the Act of 1938, increases which the defendant asserted would bring the legally permissible rent up to 250*l*. It is doubtless for this reason that the judge started his judgment by saying that he felt great sympathy with the defendant. "I am "satisfied," he said, "that 250*l*. is a fair and proper economic "rent and that there are no merits in the case." However, the judge dismissed the defendant's claim for rescission of the contract for the following reasons: he found that there was "no mistake of fact—possibly a mistake of law—in that both "parties for some obscure reason imagined that the Rent "Acts did not apply. I do not think they ever addressed "their minds to the material issue of identity."

With due respect to the learned judge, I think that the evidence strongly points to the fact that both plaintiff and defendant addressed their minds to the material issue of identity. It is true that the judge accepted the evidence of the plaintiff that he discovered in 1947 that the flat had previously been let in May, 1939, at a monthly rent of 11*l*. 13*s*. 0*d*.: a receipt for rent for that amount by a fortunate accident came into his hands. But, assuming that the plaintiff did not know and had not troubled to inquire what the previous rent was, it seems to me that all the evidence tends to show that he knew that the flat had been previously let; and he must surely be taken to have known that the previous rent was prima facie the standard rent for a flat which, even when improved, was rated at 52*l*. a year, unless, indeed, it had been so altered as substantially to lose its identity. On that point, in addition to the evidence given by the defendant, there is strong evidence as to the plaintiff's knowledge which was given by the plaintiff himself. Thus, on March 5, 1947, the plaintiff sent the drawings in connexion with the proposed development of Maywood House to a firm for the purpose of obtaining a mortgage, and the plans, as the judge said, almost speak for themselves as showing that no substantial change to this flat was being contemplated such as would in substance make a new flat.

The plaintiff in his evidence said that he questioned the defendant about the rents before the building was complete; that he said that he and the defendant must have regard to the Rent Restriction Acts in relation to the plans: and that the defendant said he would take counsel's opinion on the point. He said that the question whether the rent of the flat was controlled by pre-damage rents never arose, and that he and the defendant did not discuss the question whether it was controlled. He admitted reading to the defendant part of an opinion of counsel, but said that it was not to show that the flat was not controlled by the pre-war rent, but merely to show that regard must be had to the rent of the whole house before conversion. He said that he read this part of the opinion to show that it was not safe to assume that there was no standard rent. The plaintiff admitted that he told the defendant that his opinion was that the defendant could charge 250*l.* rent and that there was no previous control. He frankly admitted that he was " taking advantage of our mistake to get the flat " at 140*l.* for seven years." It seems to me that a good deal of the plaintiff's evidence is inconsistent with the defendant's evidence, which, the judge said, he accepted in preference to the plaintiff's.

In addition to the evidence of the defendant and all the probabilities that the plaintiff knew what the pre-war rent was, there was the evidence of one Barnard, the valuation officer of Beckenham Corporation. He said that he visited Maywood House in September, 1947, when the work was nearing completion, in order to make a new valuation. He saw the plaintiff and told him that the pre-war assessment for this flat was 45*l.* and that he proposed to increase it to 52*l.* He also said that he asked the plaintiff if he had considered that the building was controlled, and that the plaintiff had said, " No." The evidence establishes to my mind beyond any doubt that, before the rent of 250*l.* was fixed, both the plaintiff and the defendant knew that the flat had been previously let for 140*l.* a year, but thought that there was no previous controlled rent by reason of the alterations made in 1947 and 1948 to the flat. Therefore, I do not agree with the view taken by the judge that the parties never addressed their minds to the issue of identity. It seems to me that the reason why they thought that the Rent Restriction Acts did not apply (as the judge said in his judgment) was not obscure but patent on the evidence, namely, that they made a mistake and thought the work done made such a substantial alteration as to make it, in effect, a different flat.

The second question then arises for decision: was this mistake a question of fact or a question of law? In my opinion it was a question of fact, and the principle applies to this case which was laid down by Lord Westbury in his speech in *Cooper* v. *Phibbs* (1), where he said: "If parties contract "under a mutual mistake and misapprehension as to their "relative and respective rights, the result is, that that agree- "ment is liable to be set aside as having proceeded upon a "common mistake." I agree with the opinion expressed by the judge in his judgment that it was a question of fact whether the flat had been so restored, altered and reconstructed as to destroy its identity. The point was discussed in *Mitchell* v. *Barnes* (2).

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That was an appeal from a decision of the county court on the standard rent of certain premises, and one of the points taken by the plaintiff landlord was similar to the point in this case, namely, that the reconstruction of the premises had altered their identity. The appeal was dismissed on the ground that there was evidence on which the trial judge could come to his conclusion. Denning L.J., in the course of his judgment said (3): "If there was a substantial structural alteration "so that the old dwelling-house changed its identity, and two "new dwelling-houses were in fact created, then, when the "old dwelling-house ceased to exist, its standard rent would "have fallen with it. On this point, the county court judge "went and saw the premises himself . . . . He found that "there was no change of identity. The question of change of "identity is primarily an inference to be drawn by the county "court judge . . . . It is a question of degree, and it is "primarily for the county court judge. It seems to me that in "this case we cannot say that he was so clearly wrong that "we can interfere."

Phillips v. *Barnett* (4) was cited to us as authority for the proposition that the issue of change of identity was a matter of law and not of fact. In that case the defendant was the owner of three adjoining houses, which were each let at a different rent. When the houses become vacant, the defendant threw the three houses together and converted them into a factory, and then let the premises to the plaintiffs; and the question was raised whether the factory was a different thing from the three houses of which it was composed. The Divisional Court held that it was, and this decision was affirmed in the Court of Appeal.

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(1) (1867) L. R. 2 H. L. 149, 170.

(2) Ante, p. 448.

(3) Ante, p. 451.

(4) [1922] 1 K. B. 222.

Bankes L.J., in the course of his judgment, said (1): "The "rights of the parties depend on the true inference to be "drawn from the facts. The county court judge has not "drawn the inference which alone could support his judgment "and, in my opinion, there was no evidence from which he "could have drawn that inference." I think that these words clearly indicate that Bankes L.J., considered it to be a question of fact.

Atkin L.J., in the course of his judgment, said (2): "It is said that this question whether the original houses "have lost their identity is a question of fact which must "have been answered by the county court judge in favour "of the appellants. In my opinion the question involves "matter of law. As matter of law the only inference that "can properly be drawn from the facts is that this building "first came into existence when it was let to the appellants "and is not identical with the houses." These words seem to me to mean no more than this, that it is a matter of law whether on the evidence only one inference can properly be drawn from the facts. In other words, it is a matter of law whether there is any evidence to support the particular inference of fact. That is, I think, well established. But in this case before us the material facts were such that an inference of fact might be drawn either way, namely, that there had been a change of identity or that there had not been a change of identity. Thus, in a case tried in the county court where the claim is based on negligence, if the facts were such that a judge could properly hold that there was negligence, that is a finding of fact, and I apprehend that no appeal would lie to the Court of Appeal. In my opinion, therefore, there was a common mistake of fact on a matter of fundamental importance, namely, as to the identity of the flat with the dwelling-house previously let at a standard rent of 140*l*. a year, and that the principle laid down in *Cooper* v. *Phibbs* (3) applies.

(1) [1922] 1 K. B. 225.
(2) Ibid. 227.
(3) L. R. 2 H. L. 249.

Mr. Levy on behalf of his client, the defendant, informed us that if the lease were set aside he was willing to give an undertaking to enter into another and similar lease with the plaintiff, provided that the rent were based on the standard rent plus all permitted increases. This undertaking was not embodied in writing, and we agreed that we would hear counsel for the plaintiff as to its terms before making any final order in the matter.

There are two other points taken by Mr. Levy with which I must deal. One was that the plaintiff made a misrepresentation of fact, namely, that, because of the reconstruction, the rent was not controlled. The learned judge made no specific finding on that issue, but, as I read the notes of his judgment, I think that he intended to find that there was no misrepresentation of fact by the plaintiff, because he said : " I find there " was no mistake of fact . . . . I do not think they ever " addressed their minds to the material issue of identity." I have already dealt with that last sentence of the note. In the absence of any specific finding by the judge, I am not satisfied that the plaintiff made any specific misrepresentation of fact to the defendant such as would entitle the defendant to rescind the contract.

The other point was that the plaintiff was personally estopped by conduct from asserting that the control by virtue of the pre-war letting relieved him from his personal obligation to pay the defendant 250*l.* a year as reserved by the lease. The question of estoppel in cases arising under the Rent Restriction Acts was recently considered by the Court of Appeal in *Welch* v. *Nagy* (2). The essential facts in that case were that the defendant had agreed to take a dwelling-house furnished. The rateable value of the house was such as to bring it within the Rent Restriction Acts. In an action by the landlord for a declaration that the letting was a furnished one, the defendant tenant sought to establish that he had bought the furniture in the house from his previous landlord, and that he had described the house as " furnished " by inadvertence. The landlord asserted that the defendant was estopped from proof of these facts. On appeal the Court of Appeal held that the rule of estoppel could not oust the jurisdiction of the court to decide whether the letting was within or without the purview of the Rent Restriction Acts.

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(2) Ante, p. 455.

Asquith L.J., on this point, said (1): "The Rent "Restriction Acts compel the courts to treat an unfurnished "lease of a dwelling-house within the statutory limits of "rateable value in a certain way. They are not to permit "more than the standard rent and permitted increases to be "charged; nor (except under certain conditions laid down "in the Acts) have they jurisdiction to make orders for "possession. The court must take these points even if the "parties do not raise them, as they go to jurisdiction. The "court's power, on the other hand, to make orders for "possession in the case of 'substantially' furnished leases is "left unfettered by the Rent Acts. In my view, the parties "cannot, by describing (whether by accident or design) what "is in fact an unfurnished tenancy as a furnished or substantially furnished one, alter the fact that the furniture is "actually the tenant's and that such a tenancy cannot be "a furnished or substantially furnished one. To treat the "tenant here as estopped from denying that the tenancy is "unfurnished, when it is in fact unfurnished, is to confer on "the courts by the act of one of the parties a jurisdiction "(namely, an untrammelled power to make orders for "possession of premises in fact unfurnished) which Parliament "has said that the courts shall not have . . . . Just as in "general, parties are not competent to contract out of the "protection of the Acts (see *Barton* v. *Fincham* (2), and *Brown* "v. *Draper* (3)), where the true facts attract that protection, so "here the tenant cannot, in my view, be estopped from proving "the true facts, where those facts attract that protection."

It seems to me that the same principle would apply in this case, and that no rule of estoppel can oust the court from its jurisdiction to decide whether the rent claimed in respect of any dwelling-house infringes the provisions of s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which declares that, subject to the provisions of the Act, where the rent of any dwelling-house to which the Act applies is increased, then, if the increased rent exceeds by more than the amount permitted under the Act the standard rent, the amount of that excess shall, notwithstanding any agreement to the contrary, be irrecoverable from the tenant. Section 14 enacts, in effect, that, where any sum has been paid on account of any rent which is by virtue of the Act

(1) Ante, p. 464.
(2) [1921] 2 K. B. 291.
(3) [1944] K. B. 309.

irrecoverable by the landlord, it shall be recoverable from the landlord by the tenant. To apply the rule of estoppel in the present case would, to my mind, defeat these essential provisions of the Act.

In my judgment, therefore, the plaintiff made out his case as regards the standard rent. On the other hand, the defendant established his point that the lease should be rescinded on the ground of common mistake, on a suitable undertaking being given by him as regards a new lease to the plaintiff. Since writing this judgment, I have read the judgments of Denning L.J., and of Jenkins L.J. Subject to arguments by counsel on the point, I agree with the terms proposed by Denning L.J., on which the present lease should be set aside.

DENNING L.J. The first question is, what is the rent which may lawfully be charged for this flat and garage? The judge has, I think, misdirected himself in several respects, so it is open to this court to review his findings: *British Launderers Research Association* v. *Borough of Hendon Rating Authority* (1). On this review I think that the structural alterations and improvements were not such as to destroy the identity of the original flat. The landlord was entitled, therefore, to increase the rent by 8 per cent. of their cost, but was not able on this account to charge a new rent unrestricted by the Acts.

The inclusion in the lease of a garage, which had previously not formed part of the demise, gives rise to difficult questions. Even when taken together with the structural alterations, the addition of the garage does not change the identity of the flat. The standard rent, therefore, remains at 140*l.*: *Hemns* v. *Wheeler* (2) and *Langford Property Co. Ld.* v. *Batten* (3). It does not follow, however, that the tenant gets the benefit of the garage for nothing. The landlord is probably entitled to increase the rent on account of it. Such an increase is justified by s. 2, sub-s. 3 of the Act of 1920 as interpreted by this court in *Seaford Court Estates Ld.* v. *Asher* (4). Just as the landlord was entitled in that case to increase the rent because the tenant was relieved of the contingent burden of providing himself with hot water, if he wanted it, so here the tenant is relieved of the contingent burden of providing himself with a garage, if he wants one. I do not, however, pursue the point, because it was not argued before us. It is said that,

(1) [1949] 1 K. B. 462.
(2) [1948] 2 K. B. 61.
(3) 65 T. L. R. 577.
(4) [1949] 2 K. B. 481.

even allowing nothing for the garage, the permitted increases for structural alterations and improvements and increase of rates bring up the rent lawfully payable from 140*l*. to 250*l*. If, therefore, the landlord had served the prospective tenant with a proper notice of increase, the lease at 250*l*. a year would have been valid. But he did not serve any notice at all, because he thought that, owing to the improvements, the new rent was not restricted by the Acts. The tenant says that, there having been no notice, the landlord can only recover 140*l*. a year for the seven years of the lease.

So long as the lease stands the tenant's argument is unanswerable. The Rent Restriction Acts prevent the landlord from recovering any more than the standard rent unless a notice of intention to increase the rent is given either to the sitting tenant or to a prospective tenant; and, although errors or omissions in a notice are not necessarily fatal, nevertheless there must be a notice, however informal. In this case the landlord conceded that no notice was served before the new lease was granted. It follows that the raising of the rent from 140*l*. to 250*l*. was invalid, and the landlord can do nothing now to repair the omission because no fresh notice of increase can be effective so long as the lease continues. The landlord tried to overcome this difficulty by saying that the tenant was estopped from saying that the rent of 250*l*. was invalid; but, just as parties cannot contract out of the Acts, so they cannot defeat them by any estoppel.

In this plight the landlord seeks to set aside the lease. He says, with truth, that it is unfair that the tenant should have the benefit of the lease for the outstanding five years of the term at 140*l*. a year, when the proper rent is 250*l*. a year. If he cannot give a notice of increase now, can he not avoid the lease? The only ground on which he can avoid it is on the ground of mistake. It is quite plain that the parties were under a mistake. They thought that the flat was not tied down to a controlled rent, whereas in fact it was. In order to see whether the lease can be avoided for this mistake it is necessary to remember that mistake is of two kinds: first, mistake which renders the contract void, that is, a nullity from the beginning, which is the kind of mistake which was dealt with by the courts of common law; and, secondly, mistake which renders the contract not void, but voidable, that is, liable to be set aside on such terms as the court thinks fit, which is the kind of mistake which was dealt with by the

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1950
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v.
BUTCHER.
Denning L.J.

courts of equity. Much of the difficulty which has attended this subject has arisen because, before the fusion of law and equity, the courts of common law, in order to do justice in the case in hand, extended this doctrine of mistake beyond its proper limits and held contracts to be void which were really only voidable, a process which was capable of being attended with much injustice to third persons who had bought goods or otherwise committed themselves on the faith that there was a contract. In the well-known case of *Cundy* v. *Lindsay* (1), Cundy suffered such an injustice. He bought the handkerchiefs from the rogue, Blenkarn, before the Judicature Acts came into operation. Since the fusion of law and equity, there is no reason to continue this process, and it will be found that only those contracts are now held void in which the mistake was such as to prevent the formation of any contract at all.

Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of *Bell* v. *Lever Bros. Ld.* (2). The correct interpretation of that case, to my mind, is that, once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. A fortiori, if the other party did not know of the mistake, but shared it. The cases where goods have perished at the time of sale, or belong to the buyer, are really contracts which are not void for mistake but are void by reason of an implied condition precedent, because the contract proceeded on the basic assumption that it was possible of performance. So far as cases later than *Bell* v. *Lever Bros., Ld.* (2) are concerned, I do not think that *Sowler* v. *Potter* (3) can stand with *King's Norton Metal Co. Ld.* v. *Edridge* (4), which shews that the doctrine of French law as enunciated by Pothier is no part of English law. Nor do I think that the contract in *Nicholson and Venn* v. *Smith-Marriott* (1), was void from the beginning.

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(1) (1876–8) 1 Q. B. D. 348; 3 App. Cas. 459.

(2) [1932] A. C. 161, 222, 224, 225–7, 236.

(3) [1940] 1 K. B. 271.

(4) (1897) 14 T. L. R. 98.

Applying these principles, it is clear that here there was a contract. The parties agreed in the same terms on the same subject-matter. It is true that the landlord was under a mistake which was to him fundamental: he would not for one moment have considered letting the flat for seven years if it meant that he could only charge 140*l.* a year for it. He made the fundamental mistake of believing that the rent he could charge was not tied down to a controlled rent; but, whether it was his own mistake or a mistake common to both him and the tenant, it is not a ground for saying that the lease was from the beginning a nullity. Any other view would lead to remarkable results, for it would mean that, in the many cases where the parties mistakenly think a house is outside the Rent Restriction Acts when it is really within them, the tenancy would be a nullity, and the tenant would have to go; with the result that the tenants would not dare to seek to have their rents reduced to the permitted amounts lest they should be turned out.

Let me next consider mistakes which render a contract voidable, that is, liable to be set aside on some equitable ground. Whilst presupposing that a contract was good at law, or at any rate not void, the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court, it was said, had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained: *Torrance* v. *Bolton* (2) per James L.J.

The court had, of course, to define what it considered to be unconscientious, but in this respect equity has shown a progressive development. It is now clear that a contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental; or if one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and concludes a contract on the mistaken terms instead of pointing out the mistake. That is, I venture to think, the ground on which the defendant in *Smith* v. *Hughes* (1) would be exempted nowadays, and on which, according to the view by Blackburn J. of the facts, the contract in *Lindsay* v. *Cundy* (2), was voidable and not void ; and on which the lease in *Sowler* v. *Potter* (3), was, in my opinion, voidable and not void.

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(1) (1947) 177 L. T. 189.

(2) (1872) L. R. 8 Ch. 118, ~~124~~.
14 Eq. 124.

A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault. That principle was first applied to private rights as long ago as 1730 in *Lansdown* v. *Lansdown* (4). There were four brothers, and the second and third of them died. The eldest brother entered on the lands of the deceased brothers, but the youngest brother claimed them. So the two rival brothers consulted a friend who was a local schoolmaster. The friend looked up a book which he then had with him called the Clerk's Remembrancer and gave it as his opinion that the lands belonged to the youngest brother. He recommended the two of them to take further advice, which at first they intended to do, but they did not do so ; and, acting on the friend's opinion, the elder brother agreed to divide the estate with the younger brother, and executed deeds and bonds giving effect to the agreement. Lord Chancellor King declared that the documents were obtained by a mistake and by a misrepresentation of the law by the friend, and ordered them to be given up to be cancelled. He pointed out that the maxim ignorantia juris non excusat only means that ignorance cannot be pleaded in excuse of crimes. Eighteen years later, in the time of Lord Hardwicke, the same principle was applied in *Bingham* v. *Bingham* (5).

If and in so far as those cases were compromises of disputed rights, they have been subjected to justifiable criticism, but, in cases where there is no element of compromise, but only of mistaken rights, the House of Lords in 1867 in the great case of *Cooper* v. *Phibbs* (6), affirmed the doctrine there acted on as correct. In that case an uncle had told his nephew, not intending to misrepresent anything, but being in fact in error, that he (the uncle) was entitled to a fishery; and the nephew, after the uncle's death, acting in the belief of the truth of what the uncle had told him, entered into an agreement to rent the fishery from the uncle's daughters, whereas it actually belonged to the nephew himself. The mistake there as to the title to the fishery did not render the tenancy agreement a nullity. If it had done, the contract would have been void at law from the beginning and equity would have had to follow the law. There would have been no contract to set aside and no terms to impose. The House of Lords, however, held that the mistake was only such as to make it voidable, or, in Lord Westbury's words, "liable to be set aside" on such terms as the court thought fit to impose; and it was so set aside.

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(1) (1871) L. R. 6 Q. B. 597.

(2) (1876–8) 1 Q. B. D. 348, 355 ; 3 App. Cas. 459.

(3) [1940] 1 K. B. 271.

(4) (1730) Mos. 364 ; 2 Jac. & W. 205.

(5) (1748) 1 Ves. Sen. 126 ; Belt's Supplement 79.

(6) (1867) L. R. 2 H. L. 149, 170.

The principle so established by *Cooper* v. *Phibbs* (1) has been repeatedly acted on: see, for instance, *Earl Beauchamp* v. *Winn* (2), and *Huddersfield Banking Co. Ld.* v. *Lister* (3). It is in no way impaired by *Bell* v. *Lever Bros. Ld.* (4), which was treated in the House of Lords as a case at law depending on whether the contract was a nullity or not. If it had been considered on equitable grounds, the result might have been different. In any case, the principle of *Cooper* v. *Phibbs* (1) has been fully restored by *Norwich Union Fire Insurance Society Ld.* v. *William H. Price, Ld.* (5).

Applying that principle to this case, the facts are that the plaintiff, the tenant, was a surveyor who was employed by the defendant, the landlord, not only to arrange finance for the purchase of the building and to negotiate with the rating authorities as to the new rateable values, but also to let the flats. He was the agent for letting, and he clearly formed the view that the building was not controlled. He told the valuation officer so. He advised the defendant what were the rents which could be charged. He read to the defendant an opinion of counsel relating to the matter, and told him that in his opinion he could charge 250*l.* and that there was no previous control. He said that the flats came outside the Act and that the defendant was "clear." The defendant relied on what the plaintiff told him, and authorized the plaintiff to let at the rentals which he had suggested. The plaintiff not only let the four other flats to other people for a long period of years at the new rentals, but also took one himself for seven years at 250*l.* a year. Now he turns round and says, quite unashamedly, that he wants to take advantage of the mistake to get the flat at 140*l.* a year for seven years instead of the 250*l.* a year, which is not only the rent he agreed to pay but also the fair and economic rent; and it is also the rent permitted by the Acts on compliance with the necessary formalities. If the rules of equity have become so rigid that they cannot remedy such an injustice, it is time we had a new equity, to make good the omissions of the old. But, in my view, the established rules are amply sufficient for this case.

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(1) (1867) L. R. 2 H. L. 149.
(2) (1873) L. R. 6 H. L. 223, 234.
(3) [1895] 2 Ch. 273.
(4) [1932] A. C. 161.
(5) [1934] A. C. 455, 462–3.

On the defendant's evidence, which the judge preferred, I should have thought there was a good deal to be said for the view that the lease was induced by an innocent material misrepresentation by the plaintiff. It seems to me that the plaintiff was not merely expressing an opinion on the law: he was making an unambiguous statement as to private rights; and a misrepresentation as to private rights is equivalent to a misrepresentation of fact for this purpose: *MacKenzie* v. *Royal Bank of Canada* (1). But it is unnecessary to come to a firm conclusion on this point, because, as Bucknill L.J. has said, there was clearly a common mistake, or, as I would prefer to describe it, a common misapprehension, which was fundamental and in no way due to any fault of the defendant; and *Cooper* v. *Phibbs* (2) affords ample authority for saying that, by reason of the common misapprehension, this lease can be set aside on such terms as the court thinks fit.

The fact that the lease has been executed is no bar to this relief. No distinction can, in this respect, be taken between rescission for innocent misrepresentation and rescission for common misapprehension, for many of the common misapprehensions are due to innocent misrepresentation; and *Cooper* v. *Phibbs* (2) shows that rescission is available even after an agreement of tenancy has been executed and partly performed. The observations in *Seddon* v. *North Eastern Salt Co. Ld.* (3), have lost all authority since Scrutton L.J., threw doubt on them in *Lever Bros. Ld.* v. *Bell* (4), and the Privy Council actually set aside an executed agreement in *Mackenzie* v. *Royal Bank of Canada* (1). If and in so far as *Angel* v. *Jay* (5) decided that an executed lease could not be

(1) [1934] A. C. 468.
(2) L. R. 2 H. L. 149.
(3) [1905] 1 Ch. 326.
(4) [1931] 1 K. B. 557, 588.
(5) [1911] 1 K. B. 666.

rescinded for an innocent misrepresentation, it was in my opinion, a wrong decision. It would mean that innocent people would be deprived of their right of rescission before they had any opportunity of knowing they had it. I am aware that in *Wilde* v. *Gibson* (1), Lord Campbell said that an executed conveyance could be set aside only on the ground of actual fraud; but this must be taken to be confined to misrepresentations as to defects of title on the conveyance of land.

In the ordinary way, of course, rescission is only granted when the parties can be restored to substantially the same position as that in which they were before the contract was made; but, as Lord Blackburn said in *Erlanger* v. *New Sombrero Phosphate Co.* (2): "The practice has always been for "a court of equity to give this relief whenever, by the exercise "of its powers, it can do what is practically just, though it can- "not restore the parties precisely to the state they were in "before the contract." That indeed was what was done in *Cooper* v. *Phibbs* (3). Terms were imposed so as to do what was practically just. What terms then, should be imposed here? If the lease were set aside without any terms being imposed, it would mean that the plaintiff, the tenant, would have to go out and would have to pay a reasonable sum for his use and occupation. That would, however, not be just to the tenant.

The situation is similar to that of a case where a long lease is made at the full permitted rent in the common belief that notices of increase have previously been served, whereas in fact they have not. In that case, as in this, when the lease is set aside, terms must be imposed so as to see that the tenant is not unjustly evicted. When Sir John Romilly M.R., was faced with a somewhat similar problem, he gave the tenant the option either to agree to pay the proper rent or to go out: see *Garrard* v. *Frankel* (4); and when Bacon V-C. had a like problem before him he did the same, saying that "the object "of the court is, as far as it can, to put the parties into the "position in which they would have been in if the mistake "had not happened": see *Paget* v. *Marshall* (5). If the mistake here had not happened, a proper notice of increase would have been given and the lease would have been executed at the full permitted rent. I think that this court should follow

(1) (1848) 1 H. L. C. 605.
(2) (1878) 3 App. Cas. 1218, 1278-9.
(3) L. R. 2 H. L. 149.
(4) (1862) 30 Beav. 445.
(5) (1884) 28 Ch. D. 255, 267.

these examples and should impose terms which will enable the tenant to choose either to stay on at the proper rent or to go out.

The terms will be complicated by reason of the Rent Restriction Acts, but it is not beyond the wit of man to devise them. Subject to any observations which the parties may desire to make, the terms which I suggest are these: the lease should only be set aside if the defendant is prepared to give an undertaking that he will permit the plaintiff to be a licensee of the premises pending the grant of a new lease. Then, whilst the plaintiff is a licensee, the defendant will in law be in possession of the premises, and will be able to serve on the plaintiff, as prospective tenant, a notice under s. 7, sub-s. 4, of the Act of 1938 increasing the rent to the full permitted amount. The defendant must further be prepared to give an undertaking that he will serve such a notice within three weeks from the drawing up of the order, and that he will, if written request is made by the plaintiff, within one month of the service of the notice, grant him a new lease at the full permitted amount of rent, not, however, exceeding 250*l*. a year, for a term expiring on September 29, 1954, subject in all other respects to the same covenants and conditions as in the rescinded lease. If there is any difference of opinion about the figures stated in the notice, that can, of course, be adjusted during the currency of the lease. If the plaintiff does not choose to accept the licence or the new lease, he must go out. He will not be entitled to the protection of the Rent Restriction Acts because, the lease being set aside, there will be no initial contractual tenancy from which a statutory tenancy can spring.

In my opinion, therefore, the appeal should be allowed. The declaration that the standard rent of the flat is 140*l*. a year should stand. An order should be made on the counterclaim that, on the defendant's giving the undertakings which I have mentioned, the lease be set aside. An account should be had to determine the sum payable for use and occupation. The plaintiff's claim for repayment of rent and for breach of covenant should be dismissed. In respect of his occupation after rescission and during the subsequent licence, the plaintiff will be liable to pay a reasonable sum for use and occupation. That sum should, prima facie, be assessed at the full amount permitted by the Acts, not, however, exceeding 250l a year. Mesne profits as against a trespasser are assessed at the full amount permitted by the Acts, even though notices of increase have not been served, because that is the amount lost by the landlord. The same assessment should be made here, because the sums payable for use and occupation are not rent, and the statutory provisions about notices of increase do not apply to them. All necessary credits must, of course, be given in respect of past payments, and so forth.

JENKINS L.J. There is no doubt that the lease of December 1, 1947, under which the defendant demised to the plaintiff, No. 1 Maywood House, Beckenham, for seven years from September 29, 1947, at the yearly rent of 250*l.*, was executed on the assumption, common to both parties, that in the circumstances of the case the Rent Restriction Acts would not operate to prevent the whole of the rent expressed to be reserved by the lease from being legally recoverable by the defendant from the plaintiff. There is further no doubt, indeed the plaintiff admitted in evidence, that, in the course of the negotiations leading to the grant of the lease, he himself expressed the opinion to the defendant that the defendant "could charge 250*l.* and that there was "no previous control." The point was material not only in relation to the letting to the plaintiff of No. 1 Maywood House, but also in relation to the four other flats in the building, in the arrangements for letting which the plaintiff was assisting the defendant in his capacity as a surveyor. So far as the letting to the plaintiff himself was concerned, his attitude at the date of the lease is probably best summed up by his own statement in evidence to the effect that he did not mind whether 250*l.* was the controlled rent or not, but meant to pay it for seven years. At this time the defendant and the plaintiff were friends, and indeed partners in an estate agent's business styled "Godfrey & Charles." They were dealing on perfectly equal terms in the matter of the lease, the rent of 250*l.* was a fair and reasonable rent, and the plaintiff was well content with his bargain. Relations between the parties later deteriorated, and the plaintiff finally brought in Bromley county court the proceedings leading to the present appeal.

He has contended (successfully before the county court judge) that the standard rent of the premises under the Rent Restriction Acts is 140*l.* (being the rent at which the corresponding flat then known as No. 2 was let (but without the garage) to one Howard Taylor for three years from July 1, 1938); and accordingly that, as no permitted increase has been made in that standard rent in accordance with the procedure laid down by the Acts, the rent recoverable by the defendant under the lease of December 1, 1947, is limited to 140*l.* a year, and the defendant is liable to repay to the plaintiff the rent which he has so far paid in excess of that figure.

The county court judge, while deciding in favour of the plaintiff, expressed great sympathy for the defendant. That sympathy I confess I fully share, the plaintiff's case being as completely devoid of merit as any case could well be. Moreover, if the defendant had appreciated the possibility of such a claim while the lease was in negotiation, he could have defeated it in advance by serving a notice of increase under s. 7, sub-s. 4 of the Act of 1938, which, by taking due credit for the defendant's expenditure on the premises and the increase in rates, could have brought the standard rent of 140*l.*, if applicable, up to, or substantially up to, a permitted total of 250*l.* a year, that is to say, the rent actually expressed to be reserved by the lease. However, the defendant did not take that step, and the position accordingly is that, if 140*l.* a year is indeed the standard rent of the premises, then (inasmuch as no permitted increase has in fact been made in accordance with the Acts) by the express terms of s. 1 of the Act of 1920 the amount (i.e. 110*l.* a year) of the excess of the agreed rent of 250*l.* over the standard rent of 140*l.* is "notwithstanding any agreement to the contrary irrecoverable "from the tenant" (i.e. the plaintiff). Moreover, as the defendant has missed his opportunity under s. 7, sub-s. 4, of the Act of 1938, he cannot (if the lease stands) serve any effective notice of increase until the expiration of the seven-year term, as, under the provisions of ss. 2 and 3 of the Act of 1920, he can only effect an increase of rent in respect of a period during which he would but for the Act be entitled to obtain possession (s. 3, sub-s. 1). The consequence to the defendant must therefore be to tie him for seven years from September 29, 1947, to a tenant from whom he can recover only a grossly uneconomic rent, in the teeth of a fair and reasonable bargain freely made. No useful purpose will be served by further comment on the plaintiff's conduct. Section 1 of the Act of 1920 is expressly made to operate "notwithstanding any "agreement to the contrary," and if he can reconcile it with his conscience in the circumstances I have briefly stated above to go back on his bargain with the defendant in the matter of rent, he is doing no more than the statute invites him to do.

The only relevant questions for the court are: (1.) whether on the facts of the case the plaintiff is right in law in his contention that the standard rent of the premises is 140*l.* a year, and (2.) if so, whether the defendant can save himself from the disastrous consequences which I have mentioned by making out a case for rescission of the lease, or, alternatively, for holding the plaintiff estopped from claiming the benefit of the Acts.

The question as to the standard rent of the demised premises turns on the nature, extent and effect of the alterations and improvements made by the defendant before the letting to the plaintiff, the inclusion in the plaintiff's lease of the garage, which was not included in Howard Taylor's lease, being taken into account, as well as the physical alterations and improvements made in and to the subject-matter of the demise. The duty of the county court judge as regards this issue was to consider the nature, extent and effect of these alterations and improvements, and ask himself whether, having regard to their nature, extent and effect, the premises let to the plaintiff in 1947 at the rent of 250*l.* a year constituted substantially the same dwelling-house as the premises let to Howard Taylor in 1938 at the rent of 140*l.* a year. An affirmative answer to this question must lead to the conclusion as a matter of law that the standard rent of the premises let to the plaintiff is 140*l.*, while a negative answer would mean that the premises let to the plaintiff constituted for the purposes of the Acts a new dwelling-house to which no existing standard rent applied, with the result that the defendant was free under the Acts to charge the rent of 250*l.* a year expressed to be reserved by the lease, which would itself constitute the standard rent for the purposes of future control. Given the application of the correct test, which I have endeavoured to state in the form of the question posed above, the result of its application depends essentially on matters of fact and degree on which the findings of the county court judge must not be disturbed unless there was no evidence on which he could reasonably come to his conclusion.

Criticism of the county court judge's judgment on this issue was mainly directed to his reference to the case of *Ellis*

C. A.

1950

SOLLE
v.
BUTCHER.

Jenkins L.J.

and Sons Amalgamated Properties Ld. v. *Sisman* (1). The relevant passage in the very short note of his judgment with which we have been provided is in these terms: " If the house " had been damaged by enemy action, the tenant could have " claimed that the flat was still the same (*Ellis and Sons* " *Amalgamated Properties Ld.* v. *Sisman* (1)). These alterations fall short of satisfying the test." The reference to *Ellis's* case (1) was clearly inappropriate, as the point in that case was that a contractual tenant can so long as his contract of tenancy remains in force claim to be tenant of any building for the time being erected on the land comprised in his contract of tenancy, differing in this respect from a statutory tenant whose rights, as such, depend on the continued existence as such of the dwelling-house to which his statutory rights were attached.

It was therefore contended for the defendant that the county court judge showed himself to have applied a wrong test; and if his reference to *Ellis'* case (1) really meant that in his view, because a contractual tenant of the flat for a term beginning on a date before the war damage and ending on a date after the reconstruction could have claimed that he was still tenant of the reconstructed flat, therefore the flat as reconstructed is the same dwelling-house as the flat as it existed before the war damage for the purposes of standard rent, then I think he quite plainly misdirected himself.

Looking at the note of the judgment as a whole, I am not satisfied that the county court judge did really found himself on a wrong principle erroneously derived from *Ellis'* case (1). His reference to that case is certainly difficult to understand, but twice earlier in his judgment he refers to substantial identity as the test (once in relation to the inclusion of the garage and again in stating the plaintiff's contention), and his unfortunate reference to *Ellis'* case was followed by a detailed consideration of the nature and extent of the alterations, including the expense involved, with the ultimate conclusion that " it still remains the identical dwelling-house although " decorated and beautified." His detailed consideration of the work done was criticized on account of his description of the conversion of part of a bedroom into a dining recess communicating with the living room as " transfer of recess " from bedroom into dining room—simply a question of moving " the partition—not fundamental—very minor," when in fact it involved cutting through two main walls between the living room and the bedroom and the insertion of steel joists to take the weight formerly carried by those walls.

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(1) [1948] 1 K. B. 653.

I agree that the county court judge is not quite accurate here, but, after all, from the point of view of a tenant, his description of the effect of this alteration is not wide of the mark, the effect on the identity and character of the flat being no different from what it would have been if the walls removed had in fact been mere partition walls. The fact that structural precautions were incidentally necessary to secure the safety of the building no doubt added to the expense of this alteration and was in that respect material, but I do not think it was otherwise important for the purpose of considering the effect of this particular alteration on the identity of the flat as a dwelling-house. I am therefore disposed to hold that the county court judge's judgment on this issue, read as a whole, discloses no such misdirecton of himself as to justify the interference of this court on what was essentially a question of fact for him.

But, be that as it may, having myself considered the nature, extent and effect of the alterations and improvements, including the matter of the garage, I am satisfied that the county court judge's conclusion was right; and, assuming the question to be open to this court, I would myself come to the same conclusion. As to the inclusion of the garage, this court is precluded by its decision in *Langford Property Co. Ld.* v. *Batten* (1) from treating this as more than a circumstance to be taken into account in conjunction with the physical improvements and alterations in and to the premises; and, so considered, I cannot regard it as enough to turn the scale in the defendant's favour, particularly in view of the doubt as to the practice actually followed in regard to the use of the garage in Howard Taylor's time. I am accordingly of opinion that the county court judge's decision was right on the question of standard rent, and, accordingly, that the plaintiff is entitled to hold his judgment unless the defendant's case for rescission of the lease, or, alternatively, for holding the plaintiff as estopped from claiming the benefit of the Acts, can be made out.

The defendant's claim for rescission is based on the alternative grounds of misrepresentation and mutual mistake. As to misrepresentation, it is important to observe that fraud is not alleged. Therefore, any misrepresentation shown to

(1) 65 T. L. R. 577.

have been made by the plaintiff must be taken to have been an innocent misrepresentation. Moreover, the contract of which rescission is claimed is one which has been executed by the grant of a lease under seal. An executed contract will no doubt be set aside notwithstanding completion when it is shown to have been induced by fraudulent misrepresentation. But it has been repeatedly held that an innocent misrepresentation affords no sufficient ground for rescission after completion, and there is authority for the view that this applies to a lease no less than to a conveyance; see *Angel* v. *Jay* (1), and the cases there cited. I appreciate that, as Denning L.J. has pointed out, doubts have of comparatively recent years been expressed as to the validity of this principle, but for my part I am not prepared to hold that it is no longer to be regarded as the law, and, accepting it as I do, I think that it suffices to dispose of the claims for rescission on the ground of misrepresentation in the present case.

I should, however, add that the evidence in the case seems to me to disclose nothing amounting to a misrepresentation on the part of the plaintiff. The most that can be held against him is that he gave the defendant his opinion that the defendant "could charge 250*l*., and that there was no previous control." According to the defendant the plaintiff said that he (the defendant) "was clear" (i.e. clear of any previous control under the Rent Restriction Acts), but I think this comes to the same thing. In either case the plaintiff was merely giving the defendant his view of the law. Fraud being neither charged nor proved, the plaintiff must be taken to have been expressing the opinion which he genuinely held at that time. The expression of an opinion bona fide held on a question of law is not misrepresentation.

As regards the alternative ground of mutual mistake, it is pertinent to note the county court judge's finding of fact on this issue, which appears in the note of his judgment in these terms: "I find there was no mistake of fact—possibly "a mistake of law—in that both parties for some obscure "reason imagined that the Rent Acts did not apply. I don't "think they ever addressed their minds to the material issue "of identity." This finding was subjected to considerable criticism in the course of the argument before us. But I think there was ample evidence to justify the county court judge (preferring, as he did, the defendant's evidence to the plaintiff's)

(1) [1911] 1 K. B. 666.

C. A.
1950

SOLLE
v.
BUTCHER.

Jenkins L.J.

in concluding that before the grant of the lease was completed both parties knew all the material facts about Maywood House and the flats into which it had been divided. That is to say, they knew that in 1939 the building consisted of five separate flats separately let; they also knew the rents at which the flats were then let, and, in particular, that the rent of No. 1 (then known as No. 2) had been 140*l.* They also knew the nature and extent and effect on the lay-out and character of the flats of the alterations and improvements that had been made in conjunction with the restoration of the war damage; and they also knew the rateable value of each flat. These were all the facts necessary to be known in order to form a conclusion on the question whether the flat proposed to be let to the plaintiff was, under the Acts, subject to a standard rent of 140*l.*, fixed by reference to the pre-war letting of the corresponding flat to Howard Taylor. The mistake consisted simply in the drawing by the parties of an erroneous conclusion from these facts to the effect that the standard rent of 140*l.* was no longer applicable on account of the alterations and improvements which had been made since Howard Taylor's time.

The county court judge in the passage which I have just quoted said that "both parties for some obscure reason "imagined that the Rent Acts did not apply," and that he did not think "they ever addressed their minds to the material "question of identity." This was criticized as contrary to the evidence. I do not agree: I think that the county court judge, who had himself formed a clear opinion to the effect that the reconstructed flat was in substance the same dwelling-house as the original flat, described the reason why the parties did not appreciate this, and the consequent continued application of the standard rent of 140*l.*, as "obscure," but accounted for it by concluding that the parties formed the view that the alterations and improvements prevented the old standard rent from applying without really directing their minds to the material question whether, notwithstanding all the alterations and improvements, the flat proposed to be let to the plaintiff was not after all substantially the same dwelling-house as the flat formerly let to Howard Taylor. I see nothing in the evidence inconsistent with this explanation of the mistake.

But whether the parties failed to ask themselves the right question or, having asked it, answered it wrongly, I find it impossible to hold that a mutual mistake of the character here involved affords a good ground for rescission. The defendant meant to grant and the plaintiff meant to take a lease in the terms in which the lease was actually granted of the premises which the lease as granted actually comprised. They knew all the material facts bearing upon the effect of the Rent Restriction Acts on a lease of those premises. But they mutually misapprehended the effect which, in that state of facts, those Acts would have on such a lease. That is a mistake of law of a kind which, so far as I am aware, has never yet been held to afford good ground for rescission. It is a mistake not as to the subject-matter nature, or purport of the contract entered into, nor as to any question of private right affecting the basis of the contract entered into (see *Cooper* v. *Phibbs* (1)), but simply a mistake as to the effect of certain public statutes on the contract made, being in all respects precisely the contract the parties intended to make.

The mistaken conclusion, to the effect that on the facts of the case (all relevant facts being known to both parties) the Rent Restriction Acts did not have the effect of making 140*l.* the standard rent of the flat in question was, as it seems to me, equally a mistake of law whether it was due to a failure to appreciate and apply the test of identity or proceeded from an application of that test followed by an erroneous inference or opinion drawn from the facts, to the effect that the flat in question was not in substance the same dwelling-house as the flat formerly let to Howard Taylor. The application of the test, if it was indeed applied, was merely a step in the reasoning leading from the facts to the conclusion of law.

It is, moreover, to be noted that the provisions of s. 1 of the Act of 1920 are imperative and are expressly declared to be applicable notwithstanding any contract to the contrary. This must mean, I think, not only that the excess of the contractual rent over the permitted rent is irrecoverable, even if the parties expressly agreed that it should be recoverable notwithstanding the Act, but also that the excess is irrecoverable even if the parties, whether through total ignorance of the legislation, or through misapprehension of its effect, believed that the full contractual rent would be, and intended that it should be, legally recoverable. Further, I think that by necessary implication the effect of s. 1 must be not merely to prevent the tenant from being liable to pay the excess but to entitle him to hold the tenancy on payment of the permitted rent and no more: see *W. H. Brakspear & Sons Ld.* v. *Barton* (1).

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(1) L. R. 2 H. L. 149.

If the landlord could procure rescission of the tenancy merely by alleging and proving that he and the tenant entered into the tenancy under a mutual mistake to the effect that the Acts imposed no restriction on the rent which could legally be charged, the whole object of the Acts would, so far as I can see, be frustrated in such a case. That object is to fix maximum rents for dwelling-houses within the purview of the Acts and to ensure that tenants of such dwelling-houses shall be secure in their possession of them on paying no more than the maximum permitted rent, even if they have in fact agreed to pay more. If when a tenant claims his rights under the Acts the landlord can say, "We neither of us knew the "Acts applied," or "We both thought the Acts did not apply," and threaten rescission, the tenant must either risk rescission and consequent ejectment or else submit to pay whatever the landlord demands as consideration for renouncing his right to rescind.

I see no distinction for this purpose between a letting at more than the permitted rent under a contract purporting to exclude the Acts, due perhaps to a mutual mistake to the effect that the Acts permitted "contracting out," and a letting in mutual ignorance of the existence of the Acts or a letting under a mutual misapprehension as to the application and effect of the Acts in a particular case. In all these cases the Acts operate on the contract made notwithstanding the intention of the parties, and accordingly I fail to see how the existence of a mutual intention at the time of entering into the contract to the effect that the full contractual rent should be exigible, whether based on mutual ignorance of the Acts or of the prohibition against contracting out of the Acts, or on a mutual misapprehension as to the application or effect of the Acts in the particular case, can affect the validity of the contract when it is afterwards discovered that, contrary to the intention and belief of the parties at the time they made the contract, the rent legally recoverable is limited to a standard rent less in amount than the rent contractually reserved.

It should further be noted that, if the defendant's contention is correct, the landlord's right to rescission would arise in such a case so soon as he discovered the mistake as to the effect of the Acts on the lease or tenancy granted. The tenant could thus be deprived of his bargain and turned out even though he had never dreamed of claiming the benefit of the Acts and had no other intention than to pay the full contractual rent, whether legally recoverable or not. This seems to me a curious result indeed. Yet the right to rescind, if it exists at all, must exist from the moment the contract is entered into, and cannot be made to depend ex post facto on the conduct of the tenant. For these reasons I for my part find it impossible to hold that a case for rescission on the ground of mutual mistake is made out.

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(1) [1924] 2 K. B. 88, 96.

I have considered whether rescission might not be justified on the ground that the plaintiff stood in a fiduciary relationship to the defendant as his agent and adviser in the matter of the letting of the flats in Maywood House, and consequently must not be allowed to take advantage for his own benefit of the mistaken advice he gave the defendant, even though given in good faith. But the case was never put in this way, and I do not think that the fiduciary relationship essential to relief on this ground can be made out on the evidence. The contention to the effect that the plaintiff is estopped from claiming the benefit of the Rent Restriction Acts can, I think, be disposed of on the short ground that, inasmuch as the plaintiff could have claimed the benefit of the Rent Acts even if he had expressly agreed not to do so, he cannot be precluded from claiming that benefit by words or conduct not amounting to an express promise not to do so but in effect implying such a promise.

For these reasons if the result rested with me I should find myself reluctantly compelled to dismiss the appeal. But my brethren take a different view, and I may perhaps be allowed to add that my regret in differing from them is tempered by satisfaction that they have found it possible to arrive at a solution which accords with what I myself feel to be the merits of the case.

Appeal allowed. Rescission of the lease granted by the defendant to the plaintiff on the terms stated in the judgment of Denning L.J.

Solicitors: *Davis and Davis; Roy S. Wildman & Co.*

C. G. M.

C. A.

GOLDSACK *v.* SHORE.

1950
Jan. 18, 19.

Evershed M.R., Somervell and Jenkins L.JJ.

Agriculture—Agricultural holding—Gratuitous licence to occupy lands for grazing—" Agreement "—Jurisdiction—Agricultural Holdings Act, 1948 (11 & 12 *Geo.* 6, *c.* 63), *s.* 2, *sub-ss.* 1 *and* 2.

The court, and the court alone, has jurisdiction to determine whether a transaction is an " agreement " within the meaning of s. 2, sub-s. 1, of the Agricultural Holdings Act, 1948.

To be an " agreement " within the meaning of s. 2, sub-s. 1, a transaction must be a contract enforceable by law, that is, a contract supported by valuable consideration passing from grantor to grantee. Accordingly, a gratuitous licence to occupy land cannot amount to an agreement within the meaning of the sub-section.

APPEAL from Holywell county court.

The plaintiff was the owner of mountain land known as Mynydd Du in the county of Denbigh, and brought an action of trespass in the county court against the defendant who had grazed his sheep on it. The plaintiff alleged in his particulars of claim that he had in the winter of 1948–49 without consideration granted the defendant a tenancy at will or a licence to occupy the land by having sheep on it, and had determined that tenancy or licence in April, 1949; and that the defendant had nevertheless continued to graze his sheep on the land. The defendant by his defence pleaded that the plaintiff had granted him a tenancy from year to year, and, in the alternative, that the alleged grant of a tenancy at will or a licence to occupy had, by virtue of s. 2, sub-s. 1 of the Agricultural Holdings Act, 1948 (1), taken effect as

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(1) Agricultural Holdings Act, 1948, s. 2, sub-s. 1: " Subject to " the provisions of this section, " where under an agreement made " on or after the first day of March, " 1948, any land is let to a person " for use as agricultural land for " an interest less than a tenancy " from year to year, or a person " is granted a licence to occupy " land for use as agricultural " land, and the circumstances are " such that if his interest were a " tenancy from year to year he " would in respect of that land " be the tenant of an agricultural " holding, then, unless the letting " or grant was approved by the " Minister before the agreement " was entered into, the agreement " shall take effect, with the " necessary modifications, as if it " were an agreement for the " letting of the land for a tenancy " from year to year.

" Provided that this subsection " shall not have effect in relation " to an agreement for the letting " of land, or the granting of a " licence to occupy land, made " (whether or not the agreement " expressly so provides) in con- " templation of the use of the land " only for grazing or mowing

C. A.
1950
GOLDSACK
v.
SHORE.

a tenancy from year to year. He further pleaded that there was a dispute between the parties as to the operation of s. 2, sub-s. 1 of the Act which by sub-s. 2 had to be decided by arbitration, and that the court had no jurisdiction to adjudicate upon the plaintiff's claim.

At the hearing the plaintiff gave evidence which, if accepted, established that he had gratuitously granted a licence to the defendant to place his sheep on the mountain and had subsequently revoked the licence, and that, despite that revocation, the defendant had continued to graze his sheep on the land. But at the close of the plaintiff's evidence the county court judge stopped the case and non-suited the plaintiff, holding that " the word agreement bears its ordinary meaning. " From what I have heard it would appear that the plaintiff " at least agreed to grant the defendant a licence. This is " one of the situations mentioned in s. 2, sub-s. 1 of the Act. " I hold that s. 2, sub-s. 2 applies and that I have no juris-" diction to try the issue."

The plaintiff appealed.

Sutton K.C. and *Russell Lawrence* (*H. Emlyn Jones* with them) for the plaintiff. This court cannot and is not asked to express any opinion on the question whether the plaintiff's version of the facts as given by him in evidence is or is not correct: that must be decided by the tribunal of fact. But for the purposes of this appeal it must be assumed to be correct, and on that assumption it is clear that what the plaintiff granted to the defendant was a gratuitous licence to graze his sheep on the mountain (and not, as pleaded in the alternative, a tenancy at will). It is still the law that a gratuitous licence is revocable at the will of the licensor; and, as the licence was revoked, the plaintiff had established, prima facie at any rate, a cause of action, and the county court judge was wrong in refusing to proceed with the hearing.

It is not quite clear on what grounds the judge non-suited the plaintiff. He may have meant to rule that the words in

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" during some specified period of " the year, or to an agreement " for the letting of land, or the " granting of a licence to occupy " land, by a person whose interest " in the land is less than a tenancy " from year to year and has not " by virtue of this section taken " effect as such a tenancy."

Sub-section 2: " Any dispute " arising as to the operation of " the foregoing subsection in " relation to any agreement shall " be determined by arbitration " under this Act."

s. 2, sub-s. 1 of the Act of 1948, "where under an agreement ". . . . a person is granted a licence to occupy land for use "as agricultural land" covered a purely gratuitous licence, and therefore that a gratuitous licensee became a tenant from year to year under the provisions of that sub-section. If so, he misconstrued the sub-section. "Agreement" as there used means an agreement under which mutual rights and obligations are created and which is enforceable by either party in a court of law. So to construe it gives full effect to the wording of the section and also to the scope and object of the Act, which was to prevent landlords of agricultural land by subterfuges from depriving tenants of the benefit of the provisions of the Agricultural Holdings Acts. But to construe it as extending to purely neighbourly acts, such as a farmer gratuitously allowing his neighbour, whose pastures have been flooded, to place his beasts on his land until the flooded pastures can again be used, is well-nigh fantastic. A gratuitous licensee or a purely gratuitous tenant at will can never be converted into a tenant from year to year under the sub-section.

On the other hand, the judge may have meant to rule that the question whether the Act applied to any given transaction was to be decided by an arbitrator under sub-s. 2 of s. 2, and that a court of law accordingly had no jurisdiction to decide it. If so, he was wrong. It requires clear and unambiguous language to remove questions from the jurisdiction of the courts, and this section does not purport to withdraw from the courts the power of deciding whether any given transaction falls within the provision of the section or not. What is referred to arbitration is any dispute "as to the operation of "the sub-section in relation to any agreement" not "the "applicability of the sub-section to any agreement"—whatever meaning may be attached to "agreement." It may be that, when the full facts in this case are ascertained, there will be room for argument that the actual transaction was one which fell within s. 2, sub-s. 1, but it is a question which the court must decide, and at present there are no materials before the court which will enable it to decide that question. The case must therefore be remitted to the county court to ascertain the facts and give judgment in accordance with the facts so found.

J. Edward Jones for the defendant. The plaintiff alleged in his particulars of claim that he had granted "the "defendant a tenancy at will or a licence to occupy the "land," so that on his own showing the defendant became an occupier of the land and as such became liable to the obligations imposed by s. 11 of the Agriculture Act, 1947.

Even if occupier in that section means exclusive occupier, the defendant as tenant at will would be an exclusive occupier; and, if he had merely a licence to occupy, the licence was an exclusive one. There is therefore no reason why the subsection should not apply so as to make it necessary for the plaintiff to terminate the defendant's occupation by a proper notice to quit, which admittedly was never given. Whether in fact the section applied is one of the things which has to be determined by arbitration, and the judge was right in refusing to determine that question himself.

Sutton K.C. in reply. An exclusive licence gives no more rights to the licensee than a non-exclusive licence. It is merely a licence, coupled with a promise not to license any one else to do the same thing.

[JENKINS L.J. There is no such thing known to the law as a gratuitous exclusive licence.]

EVERSHED M.R. [after stating the facts]. As Mr. Sutton, on behalf of the plaintiff has pointed out, it is not open to us to express any view upon the question what in truth the transaction was and what were its real characteristics. But it is plain from his pleading, and it is his case, that, if his evidence is accepted, the transaction was one granting some privilege to the defendant without any valuable consideration —in other words, a transaction incapable of being enforced by the defendant in the courts. It is plain from the argument that another possible view may arise, namely, that the privilege was one (whether for consideration or not) limited to the period of the year known as "the winter."

The county court judge, in a brief judgment, expressed his conclusion thus: "the word 'agreement'" (in s. 2), "bears "its ordinary meaning. From what I have heard, it would "appear that the plaintiff at least agreed to grant defendant "a licence." That is, as he says, one of the situations mentioned in sub-s. 1 of s. 2, and therefore he said that he had no jurisdiction to try the issue.

[His Lordship read s. 1, sub-s. 1, and continued:] By sub-s. 2: "Any dispute arising as to the operation"—I pause to observe that it is "operation" and not "applicability"— "of the foregoing sub-section in relation to any agreement "shall be determined by arbitration under this Act."

C. A.
1950
Goldsack
v.
Shore.
Evershed M.R.

It is plain that the county court judge thought that the word "agreement" was used in the loose and popular sense as meaning in effect the assent of two minds to a certain transaction, and not as an agreement in the sense of a contract as understood by and known to the law. In my judgment the county court judge was in error in that respect.

First, however, I accept the submission of Mr. Sutton that the jurisdiction of the King's courts must not be taken to be excluded unless there is quite clear language in the Act alleged to have that effect. Illustrations were given during the argument of the result that might arise, certainly on Mr. Edward Jones' submission, if the courts were wholly debarred from adjudicating in respect of any transaction of this character; for in such a case the party whose land was affected might be left wholly without remedy.

It is to be noted, first, that, in any event, by the proviso, s. 2, sub-s. 1 is not to have effect in the case of the letting of land or the granting of a licence to occupy land for some specified period of time. If the section does not affect a certain transaction, then it must, in my judgment, follow that the provision for reference to arbitration of a dispute as to the operation of the section on that transaction can have no effect: the arbitrator would have no jurisdiction. It is to my mind quite plain that, if this transaction is by its terms excluded from the Act of 1948, then the courts have jurisdiction in respect of any consequences which arise out of the transaction and which call for the invocation of the powers of the court. Equally, to my mind, the court must have jurisdiction to decide, aye or no, whether a transaction is or is not within the proviso—in other words, is or is not excluded from the section.

If the transaction, on the evidence, is proved to be merely an arrangement (to use for the moment a colourless word) limited to "the winter of 1948–49," and if the county court judge is satisfied that, in using that formula, the parties meant some season of the year which is capable of reasonably clear ascertainment, then, it seems to me, the result would be to take the transaction out of the sub-section in any case as being for a "specified period of the year," namely, the winter, the period specified here. But that may not, of course, be the conclusion on the facts, and it is not in those terms that the plaintiff in his particulars has pleaded the case. He has pleaded that the transaction was entered into during the winter, but without valuable consideration; that is to say,

C. A.
1950

GOLDSACK
v.
SHORE.

Evershed M.R.

that it was a transaction granting to the defendant a privilege which imposed no obligations—a transaction not enforceable at the suit of the defendant.

The main question which has been the subject of debate in this court is whether such a transaction is within the terms of s. 2, sub-s. 1. I have come to the conclusion that it is not: it is true that the earlier part of the sub-section uses the word "agreement," and, secondly, refers to the grant to a person of a "licence to occupy land." If the matter had depended on that alone, it might have been argued that the sub-section covered the giving of a purely voluntary licence, without any consideration whatever, prima facie by the law revocable at will. But it is to be observed that the sub-section goes on, first, to say that the transaction which has been previously described must be such that, if the interest given were translated into a tenancy from year to year, the tenancy would be of an agricultural holding with the necessary modifications. It follows, therefore, that if the sub-section applies to it, it must be capable of being so modified (and that must mean modified consistently with its own terms) as to become enlarged into a tenancy from year to year.

Further, it follows, I think, from the sentence "unless "the letting or grant was approved by the Minister before the "agreement was entered into," that the word "agreement" is being used in the more precise sense of a contract, that is, an enforceable contract, and it is plain that the grant of a licence referred to is a grant comprehended in an "agreement," as later mentioned. Some corroboration for my view may be derived from the fact that the cross-heading (which it is at least legitimate for us to look at) immediately preceding s. 2 is: "Provisions as to Contracts of Tenancy."

When all these matters are taken into account, and particularly when regard is had to the very remarkable results that might arise if this sub-section were to be treated as applicable to a purely voluntary arrangement without any consideration, I conclude that the "agreement," which it is to be postulated must, in every case to which the sub-section applies, exist, means a contract enforceable at law, that is to say, a contract supported by valuable consideration flowing to the grantor from the grantee.

If that is right, then, if the county court judge, on further pursuing this matter, comes to the conclusion that, whatever was the arrangement, it was voluntary in the sense that no consideration flowed from the defendant to the plaintiff, the transaction will be outside the sub-section, and there can be no question for the arbitrator to determine as to the operation of the sub-section on it, or the modification of the terms of the arrangement in order to enlarge it into a tenancy from year to year.

Of course, all kinds of conclusions may emerge from a full hearing of the facts. The county court judge might come to the conclusion that there was some consideration, though not in the form of money or by way of rent. I think that it would be impossible for this court to imagine every possible result which might be arrived at on investigation of the facts of this case, and to endeavour to state in the form of some exegetical code what would be the effect of the sub-section, or whether it would have any effect, on any possible view. Mr. Sutton has put his case on the view that this was a transaction entered into without consideration on the part of the defendant; that on that view the sub-section does not apply; and that, in any case, it is competent for the courts to determine whether the transaction, being of the nature alleged, is or is not within the sub-section.

I am reminded that Mr. Sutton's first contention (although it is not strictly in accordance with the pleading which I have read) was that the privilege granted to the defendant was that of a mere non-exclusive licence—that is to say, that he was entitled to graze his sheep on the mountain, but not so as to have the exclusive right at any time so to do. If that is the right view and there was no consideration, a fortiori the arrangement will be outside the section.

Mr. Jones argued that the real test is whether the privilege or right, whatever it may be, gave to the person to whom it was granted a right to occupy—by which he means, I think, exclusively to occupy. In a sense that may beg the question, for if the nature of the privilege given is a mere licence unsupported by consideration, it cannot strictly be stated that any "right" to occupy had been conferred at all. No doubt, until it was revoked, the occupant, the licensee, could not be said to be a trespasser, but he could not claim and enforce in the courts any right to continue in occupation, still less exclusive occupation, of the property. But it might be that there could be a tenancy at will without consideration. In so

C. A.

1950

GOLDSACK v. SHORE.

Evershed M.R.

far as there was a tenancy, that would appear to involve an exclusive right of occupation. Mr. Edward Jones's point was that, assuming, against him, that the question whether the transaction was within or without s. 2, sub-s. 1, is, by sub-s. 2, a matter not for the arbitrator but for the court, then the test whether the transaction is within the sub-section depends on whether an exclusive right of occupation is given, and not on the presence or absence of consideration. Counsel supports that argument by the reference in sub-s. 2 to the word " occupy " in the sentence " granted a licence to occupy " land for use as agricultural land " ; and reference has also been made to the obligations imposed on occupiers of agricultural land by s. 11 of the Act of 1947. But I think that the right test for present purposes is whether there was or was not valuable consideration ; in other words, whether the transaction was a contract as understood and enforceable by the law, irrespective of whether an exclusive right of occupation was given or purported to be given thereby.

If that view is right, then the county court judge was wrong in treating himself as debarred from determining the question of the applicability of the Act as distinct from its operation, and he should not have stopped the case when he did. He should have continued to hear the matter, and then, according as he found the facts, have determined whether, on the view which I have stated, the case is one to which s. 2, sub-s. 1 applies. If it is, then the results are not for him to adjudicate on, and the problem is referred to arbitration. If the transaction is not covered by the sub-section, then the matter is one which he can decide and determine according to the ordinary law. I am not, as I have said, attempting, and it would not be right to attempt, to lay down for the guidance of the judge what the answer would be in every possible circumstance : I have confined myself to the two most probable solutions resulting either from the application of the proviso or the presence or absence of consideration, and I prefer to leave the matter there. It may be that other problems may arise. It is the judge who must decide, and it is within his jurisdiction to decide, whether the case is within the Act or not. Of course, if he comes to a conclusion to which one of the parties objects, it will be open to that party to come to this court again. I hope that that will not be necessary ; but we cannot, safely at any rate, try to anticipate every possible conclusion.

C. A.
1950
GOLDSACK
v.
SHORE.

For the reasons stated, I think that the judge had jurisdiction to decide this matter, and that the case should be referred back again in order that the inquiry may be pursued.

SOMERVELL L.J. I agree.

JENKINS L.J. I also agree.

Case remitted to the county court.

Solicitors: *Pritchard, Englefield & Co., for Mason and Moore Dutton, Chester; Lovell, Son and Pitfield, for Walker, Smith and Way, Mold.*

J. L. D.

BORDER RURAL DISTRICT COUNCIL *v.* ROBERTS.

C. A.
1950
Jan. 25, 26, 27.
Evershed M.R., Somervell L.J., and Hodson J.

Local government—Water rate—Rural district council—Four parishes in area of supply originally receiving water free—Alleged enforceable equity to demand reduced rate—Public Health Act, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 49), *s.* 126—*Rural Water Supplies and Sewerage Act,* 1944 (7 & 8 *Geo.* 6, *c.* 26), *s.* 6—*Water Act,* 1945 (8 & 9 *Geo.* 6, *c.* 42), *s.* 40.

In 1908 the cost of the works necessary for bringing water, supplied free of charge by a neighbouring authority, to four parishes was exclusively charged upon and paid by those four parishes. The plaintiffs, a rural district council, later became the suppliers of water to those four and thirty-three other parishes. The council charged a water rate at 2*s.* 6*d.* in the pound on the annual value of premises in the thirty-three parishes and at the rate of 2*s.* 0*d.* in the pound on the annual value of the premises in the four parishes. They sought to recover arrears of water rate at 2*s.* 0*d.* in the pound from the defendant in respect of premises occupied by him in one of the four parishes. The county court judge accepted the defendant's contention that the facts gave rise to an enforceable equity whereby the council were only entitled to charge him at a much lower rate based only on the cost of maintaining the pipes and apparatus carrying free water to the four parishes.

Held, that no such equity as alleged was established whereby the council could be compelled to exercise their power under s. 126 of the Public Health Act, 1936, to levy a differential water rate in respect of the four parishes, particularly in view of the remedy given to aggrieved persons by s. 40 of the Water Act, 1945, to apply to the Minister of Health to fix a fair water rate, the rate to be charged under s. 126 of the Act of 1936 being, moreover, a matter for the discretion of the water-supplying authority.

APPEAL from Carlisle county court.

The plaintiffs, the Border Rural District Council, claimed from the defendant, Charles Henry Roberts, 18*l.* 13*s.* 0*d.* arrears of water rate alleged to be due from him in respect of five properties in his occupation in the parish of Brampton, "a con-"tributory place" within the area of supply of the plaintiff council.

Brampton Rural District Council, the predecessors of the plaintiff council, had originally supplied water to an area which comprised seventeen parishes including Brampton. Before 1898 that council had hoped to obtain from certain springs, known as the Geltsdale Springs, additional water for their area. They were forestalled, however, by Carlisle Corporation who in that year promoted a Bill the effect of which would be to give them a prior right to all water from the Geltsdale Springs. The Brampton council opposed that Bill, and, as a result of a bargain then made, a clause was inserted in the Bill which became s. 28 of the Carlisle Corporation (Water) Act, 1898, whereby the corporation became bound to supply from the Geltsdale Springs free to the Brampton council up to a maximum of 220,000 gallons of water a day. The Act provided that the corporation would comply with their obligation by delivering the water free to two reservoirs, one known as the Garth Head, and the other as the Faugh, and the water so supplied was to be for the use of the Brampton council in respect of their seventeen parishes. Nothing in the Act stated that it was to be allocated to any one or other of the seventeen parishes.

After that statute had been passed the Earl of Carlisle granted a lease of a piece of land some 30 feet square to the Brampton council. The purpose of the demise was to give to the council a site for a subsidiary reservoir known as Blaebery Bent Tank. Its terms were in many respects very favourable to the Brampton council, and the transaction was an inherent part of the scheme which had originated in the Act of 1898 and the arrangement by which Carlisle Corporation supplied the free water. By the lease the Brampton council covenanted with the Earl that the Geltsdale free supply of water should, via the tank, or otherwise, be allocated exclusively to the four parishes named in the lease, Brampton, Castle Garrock, Irthington and Hayton. It was conceded by the defendant that the covenant by the Brampton council was, as res inter alios acta, not in law one on which he or any parishioner of Brampton could rely. The result was that the cost of leading the free water to the boundary of the four parishes was cast exclusively upon those parishes. By an order made in December, 1908, by the Local Government

C. A.
1950

BORDER RURAL DISTRICT COUNCIL *v.* ROBERTS.

Board, a sum of 8,000*l.* or 9,000*l.* representing the cost of leading the water to the four parishes was charged upon those parishes as a special expense under s. 229 of the Public Health Act, 1875.

By the Cumberland Review Order, 1934, the plaintiffs, Border Rural District Council, were constituted. The effect of that Order was that all the statutory powers and duties of the Brampton council became vested in the plaintiff council who thus became the successors of the earlier council quoad the original seventeen parishes, the plaintiff council's area of supply being extended to include an additional twenty parishes. The plaintiff council's obligations and powers were governed by general Acts, there being no relevant special Act, and, in particular, by the Public Health Act, 1936.

The plaintiff council had two main sources of water supply, the Glazier Springs and the Geltsdale Springs. Brampton and the three other parishes included in the arrangement of 1908 derived the bulk of their water from the Geltsdale Springs. As a result of the schemes of 1898 and 1908 the supply of water to the four parishes was far less costly than the supply from the Glazier Spring and other springs to the other thirty-three parishes. The plaintiff council charged a basic water rate at 2*s.* 6*d.* in the pound on the net annual value of premises in the thirty-three parishes, but charged only a rate of 2*s.* 0*d.* in the pound on the annual value of premises in Brampton and the three other parishes, the difference of 6*d.* reflecting the lower cost of supplying those four parishes with water.

The plaintiff council claimed from the defendant 18*l.* 13*s.* 0*d.* for water rates in respect of five properties in his occupation in the parish of Brampton, that sum being calculated at 2*s.* 0*d.* in the pound on the annual value of those premises. The defendant contended that the plaintiff council were not entitled to charge a higher rate for the free (Geltsdale) water to the four parishes than was represented by the cost of maintaining the supply pipes. It was subsequently conceded that, as two of the defendant's properties mentioned in the particulars of claim, though in Brampton parish, derived their water from the Glazier spring, the defendant's claim to a reduced rate in respect of them could not be sustained.

The county court judge gave judgment for 9*l.* 10*s.* 10*d.*, being as to 5*l.* 8*s.* 0*d.* in respect of the two properties receiving water from the Glazier Spring at 2*s.* 0*d.* in the pound and as to the balance at the rate of 7½*d.* in the pound on the annual value of the other premises. He held that the plaintiff council

C. A.
1950

BORDER RURAL DISTRICT COUNCIL
v.
ROBERTS.

could only charge in respect of the premises which received free water from the Geltsdale Spring by way of a rate based on the cost of maintaining the pipes and apparatus for bringing that water to the parish of Brampton.

The plaintiff council appealed.

E. H. Blain for the council. Section 126 of the Public Health Act, 1936 (1), replacing s. 56 of the Public Health Act,

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(1) Public Health Act, 1936, s. 126, sub-s. 1: "Subject to "the provisions of this Part of "this Act, a local authority who "supply water under this Act "to any premises for domestic "purposes may charge in respect "thereof a water rate, which shall "be assessed on the net annual "value of the premises as appear- "ing in the valuation list for the "time being in force or, if that "value does not appear in the "valuation list, on the net annual "value of the premises as deter- "mined, in the event of dispute, "by a court of summary "jurisdiction: Provided that the "authority may fix a minimum "charge applicable in all cases "to premises supplied with "water."

Sub-section 2: The local "authority may also enter into "agreements for supplying water "by meter, or otherwise, on such "terms as may be agreed between "them and the persons receiving "the supply, and shall have the "like powers for recovering water "charges under such agreements "as they have for recovering "water rates."

Sub-section 4: "Any ten "persons rated to the general "rate in a borough or urban "district, or any five persons "rated to the general rate in a "contributory place in a rural "district, if aggrieved by the "refusal of the local authority to "make charges in respect of all "water supplied by them under "this Act in that borough, district "or contributory place, or by "their refusal to make such "charges as those ratepayers "deem reasonable and adequate, "may appeal to the Minister, and "the Minister may make such "order in the matter as he thinks "fit."

Section 308, sub. s. 1: "The "following expenses of a rural "authority, that is to say . . . . "(*b*) expenses incurred in con- "nexion with a supply of water to "any such place; . . . . shall, so far "as they fall to be defrayed out of "rates, be special expenses charge- "able on that contributory place, "but without prejudice to the "powers of the authority under "sub-s. 4 of the said s. 190" of the Local Government Act, 1933.

Sub-section 3: "Where a "rural authority determine to "defray as part of their general "expenses the whole of any "expenses which would otherwise "be defrayed as special expenses "chargeable upon a contributory "place, or upon two or more "contributory places, it shall not "be necessary for the authority "to keep parochial accounts in "respect of those expenses and, "if those expenses were incurred "in respect of separate under- "takings for supplying water, "those undertakings shall for the "purposes of this Act and of the "Local Government Act, 1933, be "deemed to be one undertaking."

C. A.

1950

BORDER RURAL DISTRICT COUNCIL *v.* ROBERTS.

1875, gives to the plaintiffs, as water suppliers, power to charge such water rate as they think fit. It is for them to decide whether the cost of supplying water shall be charged by a water rate to the water consumer or whether part of the cost shall be borne by the ratepayers generally as general expenses under s. 6 of the Rural Water Supplies and Sewerage Act, 1944 (1). Any ratepayer aggrieved by the rates charged has his remedy: he can apply to the Minister of Health under s. 40 of the Water Act, 1945 (2).

C. E. Scholefield for the defendant. Where any particular area of supply has discharged all the cost of bringing a supply of water to that area, then it should only be charged the cost of maintaining the water-supply system. The expenses of the water undertaking as distinguished from the cost of supply can be financed either by a water rate or out of the general rate under s. 6 of the Rural Water Supplies and Sewerage Act, 1944, or by a combination of both. It is not contended that s. 126 of the Act of 1936 imposes any obligation on the water undertakers to charge a differential water rate between parishes varying with the cost of supply to the parishes. All that s. 6 of the Act of 1944 does is to enable a local authority to throw on the general rates part of the cost of the water undertaking in respect of any particular parish so as to equalize the water rate payable by the various parishes in the area of supply. Having regard to the sums paid by these four parishes for the installations necessary to bring the Geltsdale water to them, the plaintiff council are under a moral obligation not to charge a water rate in respect of premises in those parishes supplied with Geltsdale water at a higher rate than is necessary to pay for the maintenance of the works of supply which have been constructed at the expense of the parishes. That moral obligation is such as to vest in the defendant an enforceable equity to have the water rate adjusted so as to reflect adequately the sums paid by those parishes in the past to have this free supply of water brought to them.

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(1) Rural Water Supplies and Sewerage Act, 1944, s. 6: "Notwithstanding anything in s. 308 "of the Public Health Act, 1936, "all expenses incurred (whether "before or after the passing of "this Act) by a rural district "council in connexion with . . . . "a supply of water shall, in so "far as they fall to be defrayed "out of rates made in respect of "periods beginning after the end "of March, 1945, be general "expenses."

(2) Water Act, 1945, s. 40, sub-s. 1: "The Minister, on an "application made to him by any "statutory water undertakers "supplying water under a local "enactment, or by a local "authority within whose county "or district any such undertakers "supply water, or by twenty or "more persons supplied with "water by any such undertakers, "may by order make such alter- "ation in the rates and charges "which the undertakers are "authorised to levy and make as "he considers reasonable: pro- "vided that, where the under- "takers are a company, he shall "not make any alteration by way "of reduction unless he is satisfied "that it will not endanger their "ability, so long as their under- "taking is managed efficiently, "to provide a reasonable return "upon the paid-up capital of the "undertaking (regard being had "by him to any capital which "the undertakers may reasonably "be expected to expend during "the next five years) after paying "all proper expenses of and "connected with the working "management and maintenance "of the undertaking, providing "for any contributions which the "undertakers may lawfully carry "to any reserve fund or con- "tingency fund making good "depreciation (in so far as pro- "vision therefor is not made by "any such fund as aforesaid), "and meeting all other costs, "charges and expenses, if any, "properly chargeable to revenue."

Sub-section 4: "In relation to "any period during which an "order made under this section "is in operation, the enactments "relating to the undertakers shall "have effect as if the rates and "charges specified in the order "made under this section were "substituted for the rates and "charges specified in those "enactments."

EVERSHED M.R. The plaintiffs, Border Rural District Council, claim from the defendant, Charles Henry Roberts, 18*l.* 13*s.* 0*d.* in respect of water-rate for the period ending March 31, 1949, alleged to be due in respect of five properties in his occupation. The properties are all situated in the parish of Brampton, which is a "contributory place" within the meaning of the Public Health Acts, in the area of the rural district council. That council are in fact suppliers of water to this area, and, as there is for this purpose no special Act, their obligations and powers are governed by the general Acts, particularly by the Public Health Act, 1936.

The real point in this appeal may fairly be stated thus: having regard to all the circumstances, are the plaintiff council bound so to exercise their powers to charge water rates as to reflect fairly in the rates charged to Brampton parish, and the other three parishes in a like case, the fact that the supply of water to them, derived as it is mainly from Geltsdale, is far less costly than is the supply of water to the remaining thirty-three parishes which comes from the Glazier Springs and other sources? What the plaintiff council have in fact done is to charge a water-rate, based, as it must be, on the net annual value of the properties concerned, at 2*s*. 6*d*. in the pound in all parishes other than Brampton and its three companion parishes, but in the latter parishes to charge only at the rate of 2*s*. 0*d*. in the pound, thus by a differential of only 6*d*. reflecting the difference in the cost. It is argued for the defendant that that 6*d*. is an altogether negligible appreciation of the claim of the four parishes when regard is had to all the facts.

The claim of the plaintiff council is that they have statutory power to charge a water rate in the way in which they have done it, and that they are not bound so to limit their charge in respect of Brampton and the other three parishes as to reflect only the cost of maintenance. That is the issue which we have to try.

It is not in dispute that the plaintiff council are entitled, by virtue of their statutory powers, to sue as they did in the county court for these water rates, and the question turns solely on the effect, in the circumstances of this case, of s. 126 of the Public Health Act, 1936.

The result of the transactions of 1908 was, it is argued for the defendant, that the four parishes themselves paid all the cost to which the Brampton council were put in regard to the Geltsdale water supply. The other parishes were wholly relieved of all those expenses. The result of the schemes of 1898 and 1908 was that the only cost which the plaintiff council now have to bear in regard to the Geltsdale supply to Brampton is the relatively small one of maintaining the pipes and apparatus. It is argued for the defendant that, when regard is had to the fact that the four parishes were intended from the first to have this water and to have it free, and to the fact that they provided for the cost of laying the pipes and having the apparatus installed for doing so, there comes into existence a claim, so strong as to amount to an enforceable equity, that the plaintiff council shall, in the exercise of their statutory powers, only charge by way of water-rate against the consumers in the parishes that maintenance figure which has been quantified by the judge at 7½*d*. in the pound of the net annual value. It is conceded by Mr. Scholefield that, apart from the creation of such an equity, there is power in the relevant statutes for the plaintiff council to spread the total cost of water supply as they think fit, and, in particular, uniformly over all the consumers throughout their total area; and that they are not bound by statute to treat each parish as a unit, or to calculate as regards each parish the cost of the supply of water to that parish and levy water rates on the consumers in each parish so as to balance the costs relevant to the particular parish.

That concession by Mr. Scholefield has rendered it unnecessary to do more than to refer in some detail to s. 126 of the Act of 1936. That section took the place of s. 56 of the Act of 1875, which was repealed by Part I. of the schedule to the Act of 1936. Section 126 provides as follows by sub-section 1: "Subject to the provisions of this Part of this Act, a local "authority who supply water under this Act to any premises "for domestic purposes may charge in respect thereof a water "rate, which shall be assessed on the net annual value of the "premises as appearing in the valuation list for the time being "in force . . . ." There follows this important proviso: "Provided that the authority may fix a minimum charge "applicable in all cases to premises supplied with water." Such a minimum charge would prima facie, I conceive, be a sum of money, say 10s. 0*d.*, in respect of all the relevant properties. Obviously, therefore, the proviso is important as indicating that it is within the powers of the plaintiff council, and within the contemplation of the Act, that there may be a uniform charge or scale of charges over the whole area of supply.

As Mr. Scholefield has raised a subsidiary argument on the word "supply," I should mention that the duty of the local authority as regards supply is prescribed by s. 111. It is their duty, by virtue of para. (ii) of that section, to secure that every house has rendered available to it within a reasonable distance "a sufficient supply of wholesome water for domestic "purposes." Section 308 gives power to an authority to make contributions in relief, so to speak, of water rate from their general sources of revenue, and to do so by treating any specific cost incurred as special expenses to be paid out of ordinary rates and charged specifically, save as in the section expressly provided, upon the parish for the benefit of which the expenses were incurred. It was in pursuance of such a provision in that Act or its predecessor that, as I follow it, the special expenses of the construction of the pipes, and so on, were charged specifically to the four parishes.

The effect of the presence of that section, it was suggested, might be to show that it was the intention of Parliament to make a parish the unit for all purposes when a local authority had to consider how they should recover from the persons entitled to the benefits the cost incurred of supplying water. If that were right, it might have, or have had, an influence on the proper construction of s. 126; but it is important to note that by s. 6 of the Rural Water Supplies and Sewerage Act, 1944, the effect of s. 308 of the Act of 1926 was revised.

By s. 6 of the Act of 1944: "Notwithstanding anything "in s. 308 of the Public Health Act, 1936, all expenses "incurred (whether before or after the passing of this Act) "by a rural district council," among other things in giving a supply of water, "shall in so far as they fall to be defrayed "out of rates"—that means general rates as distinct from water-rate—"made in respect of periods beginning after "the end of March, 1945, be general expenses." In other words, it is provided that, so far as charging out of general rates is concerned, the intention of Parliament thenceforth was that there should be a spread of the whole cost over the whole area, instead of treating prima facie as the proper unit for levying these charges the contributory places or parishes. In so far, therefore, as the construction of s. 126 might previously have been affected by what may be called the parochial emphasis in s. 308, that emphasis has now gone. Mr. Scholefield, however, has never made it part of his argument, as I have said, that s. 126, on its true construction points to parochial assessment. He has sought to derive help from s. 6 of the Act of 1944 by arguing that, since all the expenses which are to be charged on rates generally must now be spread uniformly over the whole area, the only means of doing justice, when the costs incurred differ between one parish and another, is to make use of the power given by s. 126 of the Act of 1936 to charge differential water rates, reflecting the actual costs to the several parishes.

It remains to refer to s. 126, sub-s. 4 of the Act of 1936, whereby: "Any ten persons rated to the general rate in a "borough or urban district, or any five persons rated to the "general rate in a contributory place in a rural district, if "aggrieved," putting it briefly, by the way in which the local authority have assessed their water-rate, may appeal to the Minister of Health, who can make an order, as he thinks fit, varying the water-rate as charged. That sub-section is now replaced by the general s. 40 of the Water Act, 1945, which provides that such an application may be made "by

" any statutory water undertakers supplying water under a " local enactment, or by a local authority within whose county " or district any such undertakers supply water, or by twenty " or more persons supplied with water," and that the Minister on such an application may make an order as he thinks reasonable as to the proper way in which the rate should be levied.

That is important, for this reason: assuming, as Mr. Scholefield admits, that there is, prima facie, power in the local authority to levy differential rates as well as uniform rates, and assuming against him that there is here no duty on the authority to levy differential rates, then there may still be a remedy if persons aggrieved think it to be unfair, namely, the remedy of application to the Minister. Indeed, it may, I think, be put more strongly: the fact that there is such a remedy obviously makes less forcible the argument that there must be found in such a case as this some equity compelling the authority to make differential rates lest injustice be done. Such an equity, difficult on any view, as I think, to extract from the circumstances, is plainly less compelling if some other remedy is made available by Parliament.

The basis of the argument for the defendant is that on the facts here there is an equity compelling the plaintiff council to exercise their powers, admittedly sufficient to enable them, in the absence of some such compulsion as suggested, to levy the water rate as they did, to levy it in accordance with the principles which appealed to the county court judge.

Reference was made to *Northampton Corporation* v. *Ellen* (1) for the purpose of showing that a water rate is something quite different in character from a general rate. In other words, the use of the word " rate " is not to be deemed to give to a water rate all the characteristics, statutory or otherwise, which properly belong to a poor rate or to rates which derive their origin from the statute of Elizabeth. At the beginning of his judgment, Romer L.J., said (2): " Having heard the " case fully argued, and on examination of the various Acts " on which the question depends, I have come to the conclusion " that there is nothing in the words of those Acts "—relating to water rate—" sufficiently strong to justify the court in " saying that the charge in respect of all houses in the borough " for water supplied for domestic purposes must be at an " equivalent rate in the pound." Then, after referring to the

(1) [1904] 1 K. B. 299. (2) Ibid, 316, 317.

Waterworks Clauses Act, 1847, he said: "I cannot find in that "Act anything sufficiently clear to indicate that, whenever "what is called a 'water rate' has to be paid in respect of "dwelling-houses in a district, the amount of the charge "must be arrived at by taking an equal percentage on the "values of all such houses." In that case complaint was made because some premises had been charged $7\frac{1}{2}$ per cent. on the rateable value and others 5 per cent. In the result it was held that it was within the powers of the authority so to differentiate, and that the word "rate" or the expression "water rate" did not import any necessary implication of uniformity.

As the argument has turned out, that has not been the issue in this case. In the absence of this so-called equity, it is conceded by both counsel, s. 126 of the Act of 1936 would authorize the water rates levied in this case. The transactions, beginning in 1898, have resulted in the four parishes having a water supply which is, for the most part—for I do not forget that some, at any rate, of the water is derived from Glazier Springs—far less expensive to the authorities than is the supply to the other parishes. In addition, special levy was made on the parishes in 1908 to recover the cost of the laying of the pipes. Having regard to those transactions and to that special levy, can it be said that the plaintiff council cannot be permitted by these courts to exercise their powers of fixing a water rate otherwise than by limiting the water rate in the case of Brampton and the other three parishes to maintenance only?

I can well understand the feeling of grievance which has given rise to these proceedings, but it does not seem to me that that grievance can create such an equity as this court can comprehend or will enforce. It is merely a matter of discretion in the authority, and there is nothing, to my mind, which compels them to do otherwise than they have done. If the defendant and his fellow ratepayers have a grievance, he is, by virtue of s. 40 of the Act of 1945, not without remedy; though I am not suggesting that application to the Minister under the section will succeed: on that I express no view.

By way of subsidiary argument, it was argued that the word "supply" in the sentence "who supply water" in s. 126 on the facts of this case means or covers only the maintenance of the pipes and other apparatus. If that is so, the only charge which the plaintiff council can make "in respect "thereof" is the charge in respect of maintenance. But, with all respect to Mr. Scholefield's plea, I cannot see that this water, emanating, as it does, from the Geltsdale Springs, which the plaintiff council have secured as the result of a statute, is any the less a supply by the local authority in accordance with their statutory duty merely because it is alleged that it now costs them nothing to supply it beyond the cost of maintaining the pipes. I cannot on that ground, any more than on the other, persuade myself that the plaintiff council's powers under s. 126 of the Act of 1936 have been wrongly exercised.

For these reasons I have come to the conclusion that the view of the judge cannot be supported in law, and that the appeal ought to be allowed. In the result, for the figure of 9*l*. 10*s*. 10*d*., for which the judge gave judgment, the larger figure claimed of 18*l*. 13*s*. 0*d*. will be substituted.

SOMERVELL L.J. I agree, and I will add a few observations as we are differing from the county court judge. I agree with him that this case turns primarily on the construction of s. 126 of the Public Health Act, 1936. Though it is unnecessary to decide the point, I think it fairly plain on the face of that section that one of the reasons why it and its predecessor or predecessors were necessary was that statutory authority was needed to enable local authorities supplying water possibly to charge at all, but certainly to charge on the basis which is first provided, namely, by an assessment on the net annual value of the premises. If it had been sought to do that without statutory authority, it might well have been objected that the authority must show how much water had been consumed in particular premises and charge accordingly. Section 126, sub-s. 1, with its proviso, therefore seems to be directed, as also is sub-s. 2, to the manner in which water may be charged for, and does not seem to make any reference to the considerations which are to be taken into account, or which should not be taken into account, in arriving at the rate or other charge which the local authority seek to impose.

At one time in the course of the argument I was inclined to think that the provisions in s. 308 of the Act of 1936 concerning expenses incurred in connexion with the supply of water which fell to be treated as special expenses chargeable on the area supplied might be relevant to the construction

C. A.
1950

BORDER RURAL DISTRICT COUNCIL v. ROBERTS.

Somervell L.J.

of s. 126. It might, it seemed to me, have been suggested that, as that is the principle with regard to expenses which fall on the general rates, a local authority in fixing their water rate ought to have regard to the cost of supplying water, not to individual houses, but to any particular contributory place. Mr. Scholefield did not contend for that construction, and, indeed, owing to the fact that s. 308 has been replaced by s. 6 of the Act of 1944 which has already been quoted, the question is perhaps an academic one. But, on the whole, I have come to a different conclusion from that which I suggested in argument. I think, without throwing any doubt on the power of a local authority to make differential water rates, that it might well have been said that the general scheme or policy contemplated by the two sections was that the water rate should be, broadly speaking, uniform, or fairly uniform, if I may put it in that way, any special differences in cost as between different contributory places being met not by using the power to make a differential water rate, but by using the power to charge special expenses under s. 308. But that provision in s. 308 has now been replaced, in respect of that part of it with which we are concerned, by s. 6 of the Rural Water Supplies and Sewerage Act, 1944. I think that that section in itself places a difficulty, which did not exist before, in the way of Mr. Scholefield's argument that we must here find some right or equity which would enable these parishes, which are specially favoured in the sense that their water costs less than that of others, to get the advantage of that favourable financial position.

I think—again without throwing any doubt on the power to levy a differential rate—that s. 6 of the Act of 1944 indicates a policy in this area of legislation whereby in these rural areas the costs should be spread rather than fixed parish by parish or contributory place by contributory place. Parliament having embodied that policy in that section, so far as expenses falling on the general rates are concerned, this weakened, I should have thought, any argument of the kind that Mr. Scholefield seeks to put forward based on the favourable position of these four parishes. I also think that there is great force in the argument based on sub-s. 4 of s. 126 of the Act of 1936 and s. 40 of the Water Act, 1945.

I would refer in conclusion to the passage on which Mr. Scholefield relied from Maxwell's Interpretation of Statutes, (9th ed.,) p. 250, and to the case to which he referred. There are cases which show that in certain circumstances, although the word " may " is used, if an authority, or whoever it may be, are given power to do an act which is not done, process is available to compel it to be done. The case most often quoted is *Julius* v. *Bishop of Oxford* (1). But the case to which Mr. Scholefield drew attention is thus referred to in the passage from Maxwell just mentioned : " But an enactment " that churchwardens ' may ' make a rate for the reimburse- " ment of constables . . . . is no mere permission to do such " acts, with a corresponding liberty to abstain from doing " them." I have altered the author's words to some extent because he refers also to other cases ; but that is how he describes the effect of the authorities. He continues : " A duty " is at the same time cast upon the persons empowered."

The case in question is *Rex* v. *Barlow and Jeans* (2). The defendants there were churchwardens of the parish of St. Warburgh in Derby. They were required to make a rate for the reimbursement of constables. The court is quoted as saying : " But the court would not quash the indictment, " because the defendants were blameable, it being very " reasonable that the constables should be reimbursed ; and, " therefore, as to the first objection, viz., the inequality of " the charges of the several parishes it shall be taken reddendo " singula singulis. And as to the other objection, that the " words of the statute are that they ' may make a rate,' and so " 'tis at their election, whether they will make one or not : per " curiam, where a statute saith that such a thing ' may be " ' done,' 'tis always understood it must be done." That last sentence of course, obviously goes beyond what has been laid down.

It is sufficient to say of the present case that I can see really no analogy between the discretion conferred upon a local authority in deciding what water rate to levy on the one hand, and the case where, though a statute clearly intended that constables should be reimbursed, those who had the power to put into operation the machinery enabling them to be reimbursed were refusing to do so. I do not think that Mr. Scholefield succeeds in bringing the defendants within the principle which was there acted on.

I agree that this appeal should be allowed.

(1) (1880) 5 App. Cas. 244.

(2) (1693) Carthew 293.

C. A.

1950

BORDER RURAL DISTRICT COUNCIL *v.* ROBERTS.

HODSON J. I agree that the appeal should be allowed for the reasons given.

Appeal allowed.

Solicitors: *Kinch & Richardson, for The Clerk to Border Rural District Council; Moodie, Randall & Carr, for R. Milburn & Son, Brampton.*

B. A. B.

END OF VOL. I

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1950, will be as follows :—

In the First Series,
[1950] Ch.
In the Second Series,
[1950] 1 K. B. [1950] 2 K. B. [1950] P.
In the Third Series,
[1950] A. C.

INDEX

AGRICULTURE — *Agricultural holding — Gratuitous licence to occupy lands for grazing— " Agreement " — Jurisdiction — Agricultural Holdings Act*, 1948 (11 & 12 *Geo.* 6, *s.* 63), *s.* 2, *sub-ss.* 1 *and* 2.
GOLDSACK *v.* SHORE - **C. A. 708**

2. —— *See* LANDLORD AND TENANT.

APPEAL — Evidence on. *See* EVIDENCE.

2. —— From justices. *See* CROWN PRACTICE.

BILL OF EXCHANGE. *See* PROCEDURE.

CHARTER PARTY. *See* SHIPPING.

CONTRACT — *Divorce — Wife's petition on ground of adultery— Agreement by husband to pay* 3*l. a week alimony from date of decree nisi — No consideration for undertaking — Construction—Meaning of " alimony."*
GAISBERG *v.* STORR - - **C. A. 107**

2. —— *Lease — Illegality — Defence regulation prohibiting professional use of premises —Misrepresentation by lessor — Mistake of fact—Demise of premises for professional purposes—Lessee's payment of rent in advance —Lessor debarred from enforcing lease— Lessee's remedies—Money had and received— Unjust enrichment—Defence* (*General*) *Regulations*, 1939, *reg.* 68 CA (1).
EDLER *v.* AUERBACH - **Devlin J. 359**

3. —— *Sale of goods or work and labour done—Time of essence—Expiry of time— Waiver by purchaser—Subsequent notice requiring completion in reasonable time—Time again of the essence.*
CHARLES RICKARDS, LD. *v.* OPPENHAIM **C. A. 616**

COSTS. *See* FACTORIES.

CRIMINAL LAW — *Aiding and abetting — Mens rea—House sold above permitted price— Solicitors acting for vendor—Whether guilty of offence—Building Materials and Housing Act*, 1945 (9 & 10 *Geo.* 6, *c.* 20), *s.* 7, *sub-s.* 1.
JOHNSON *v.* YOUDEN **Divl. Ct. 544**

CRIMINAL LAW—*continued.*

2. —— *Assault on young girl—Child witness—Capacity to take oath—Evidence of mentality given in juror's absence — Irregularity—Conviction—Validity.*
REX *v.* REYNOLDS - - **C. C. A. 606**

3. —— *Loitering with intent to commit a felony—" Suspected person "—Proof by evidence of previous convictions—Police unaware of previous convictions at time of arrest— Firearms Act*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 12), *s.* 23, *sub-s.* 2—*Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4.
REX *v.* CLARKE - - **C. C. A. 523**

4. —— *Obtaining money by false pretences— Gist of offences—Untrue statements causing transfer of money—Intention and expected ability to repay money—Relevance.*
REX *v.* KRITZ - - - **C. C. A. 82**

5. —— *Person " found by night in a " building "—Prisoner with one hand over window—Conviction quashed—Larceny Act*, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 28, *sub-s.* 4.
REX *v.* PARKIN - - **C. C. A. 155**

6. —— *Sentence — Preventive detention and corrective training—Notice and proof of previous convictions — Procedure — Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 21, 22, 23.
REX *v.* DICKSON - - **C. C. A. 394**

7. —— *Wounding with intent to murder— Conviction—Sentence of penal servitude— Subsequent death of person wounded—Indictment for murder—Plea of autrefois convict— Plea not available to accused.*
REX *v.* THOMAS - - **C. C. A. 26**

CROWN PRACTICE—*Mandamus— Quarter sessions — Appeal from justices — Matter not involving a conviction — Refusal of quarter sessions to grant application to state case— Whether compellable by mandamus.*
REX *v.* SOMERSET JUSTICES. *Ex parte* ERNEST J. COLE & PARTNERS, LD. **Divl. Ct. 519**

DISTRESS DAMAGE FEASANT — *Pound covert — Tender — Plaintiff's heifer impounded by defendant — Right to impound — Demand by defendant for "salvage" and "keep" of heifer — Demand alleged to be exorbitant both in quantity and quality—Duty still on plaintiff to estimate the damage and tender, in money, the equivalent.*
SORRELL *v.* PAGET - - **C. A. 252**

DIVORCE. *See* CONTRACT.

EMERGENCY LEGISLATION — *Possession of land taken by competent authority— Agreement between authority and permitted occupier —Tenancy—No power in authority to create— Ultra vires — Estoppel — Defence (General) Regulations,* 1939 (*St. R. & O. No.* 927), *reg.* 51 (1) (2).
MINISTER OF AGRICULTURE AND FISHERIES *v.* MATTHEWS - - **Cassels J. 148**

2. —— *Requisitioning — Compensation — Requisitioned premises converted into air-raid shelter—Claim for compensation for period between derequisitioning and reinstatement of land—"Doing of work" on land—"Damage "to land" — Construction — Compensation (Defence) Act,* 1939 (2 & 3 *Geo.* 6, *c.* 75), *ss.* 1, 2, 3, *sub-ss.* 3, 8—*Requisitioned Land and War Works Act,* 1948 (11 & 12 *Geo.* 6, *c.* 17), *s.* 11, *sub-s.* 2.
J. LYONS & CO., LD. *v.* HOME SECRETARY **Divl. Ct. 531**

ESTOPPEL. *See* EMERGENCY LEGISLATION.

EVIDENCE — *Practice — Appeal — Application for leave to recall witness for cross-examination as to credit—Discretion of court— Exercise thereof—R. S. C., Or.* 58, *r.* 4.
BRADDOCK *v.* TILLOTSON'S NEWSPAPERS, LD. - - - - - - **C. A. 47**
2. —— *See* CRIMINAL LAW.

FACTORIES — *Dangerous machinery — Definition of "securely fenced"—Factories Act,* 1937 (1 *Ed.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 14, *sub-s.* 1; *s.* 16.
Costs — Appearance of third party on hearing of appeal.
SMITH *v.* MORRIS MOTORS, LD. AND HARRIS **Divl. Ct. 194**

GAMING AND WAGERING — *Horse racing — Account stated—Bets placed by agent with bookmaker on behalf of principal—Losses paid by agent— Account sent by agent to principal and orally agreed by him—Default by principal — Action by agent against principal on account stated—R. S. C.* 1883. *Or.* 25, *r.* 4— *Gaming Act,* 1892 (55 & 56 *Vict., c.* 9), *s.* 1.
LAW *v.* DEARNLEY - - **C. A. 400**

2. —— *Justices' power to order destruction of machines—"Special warrant" under the Gaming Act,* 1845—*Purported arrest of*

GAMING AND WAGERING—*continued.*

person elsewhere than on premises specified in warrant—Power of police officer to grant bail— Gaming Act, 1845 (8 & 9 *Vict., c.* 109), *ss.* 3, 8—*Criminal Justice Administration Act,* 1914 (4 & 5 *Geo.* 5, *c.* 58), *s.* 21—*Suppression of Unlawful Games Act,* 1541 (33 *Hen.* 8, *c.* 9), *s.* 14.
COUGHTREY *v.* PORTER **Divl. Ct. 629**

3. —— *Pool betting — Football pool — Using premises for "pool betting transac- "tions"—Betting and Lotteries Act,* 1934 (24 & 25 *Geo.* 5, *c.* 58), *s.* 3, *sub-s.* 2.
ZEIDMAN *v.* OWEN - **Divl. Ct. 593**

HOUSING—*House occupied "by persons of "the working classes"—In some respect unfit for human habitation—Notice from local authority requiring specified works—Earlier consideration by authority—Detailed estimate of cost of individual items of repair not a condition precedent—Regard to estimated cost of works and "the value which it is estimated "the house will have when the works are com- "pleted"—"Value" means freehold value— Housing Act,* 1936 (26 *Geo.* 5, & 1 *Edw.* 8, *c.* 51), *s.* 9, *sub-ss.* 1, 3.
BACON *v.* GRIMSBY CORPORATION **C. A. 272**

HUSBAND AND WIFE — *Maintenance order —Husband and wife living under same roof— Order not enforceable—"Resides with"— "Cohabitation" — Decision of Divisional Court criticised by Court of Appeal—Not overruled—Duty of justices to follow decision of Divisional Court — Summary Jurisdiction (Separation and Maintenance) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 51), *s.* 1, *sub-s.* 4; *s.* 2, *sub-s.* 2.
WHEATLEY *v.* WHEATLEY **Divl. Ct. 39**

2. —— Matrimonial home. *See* LANDLORD AND TENANT.

LAND DRAINAGE — *Catchment board — Cleansing watercourse—Dredgings deposited on river bank—Diversion of flood water—Damage to bridge of adjoining landowner—Injury through exercise of board's statutory powers— Compensation— Action for damages for nuisance— Whether maintainable — Limitation — Public authority—Institution of action within one year of neglect or default— Continuing act, neglect or default— Land Drainage Act,* 1930 (20 & 21 *Geo.* 5, *c.* 44), *s.* 34, *sub-ss.* 1, 3; *s.* 38, *sub-s.* 1—*Limitation Act,* 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 21.
MARRIAGE *v.* EAST NORFOLK RIVERS CATCHMENT BOARD - - **C. A. 284**

LANDLORD AND TENANT — *Agreement for tenancy—Dwelling-house used as business premises—Covenant to repair and reinstate— Termination of tenancy—Intention of landlord*

LANDLORD AND TENANT—*continued.*

to pull premises down—Claim for damages for breaches of covenant—Claim barred—Reinstatement included in repair—Landlord and Tenant Act, 1927 (17 & 18 *Geo.* 5, *c.* 36), *s.* 18, *sub-s.* 1.
CUNLIFFE *v.* GOODMAN **Lord Goddard C.J. 267**

2. —— *Agricultural holding—Notice to quit served by landlord—Consent of Minister of Agriculture not obtained—Tenant quits in consequence of notice—Tenant entitled to compensation—Agricultural Holdings Act*, 1927 (13 & 14 *Geo.* 5, *s.* 9), *s.* 12—*Defence (General) Regulations*, 1939 (*St. R. & O.* 1939, *No.* 927), *reg.* 62, *para.* 4A.
KESTELL *v.* LANGMAID - **C. A. 233**

3. —— *Covenant not to assign without the landlord's consent—Provision that "such "consent will not be withheld in the case of a "respectable and responsible person" — The word "unreasonably" not to be read in—Landlord and Tenant Act*, 1927 (17 & 18 *Geo.* 5, *c.* 36), *s.* 19, *sub-s.* 1.
MOAT *v.* MARTIN - - **C. A. 175**

4. —— *Death of contractual tenant intestate —Notice to quit served on President of P. D. and A. Division — Termination of contractual tenancy—Son of deceased tenant, living with her, continues in possession—Subsequently son obtains letters of administration—Doctrine of "relation back" invoked—Contention that administrator was contractual tenant when notice to quit served—Claim to hold over as statutory tenant.*
FRED LONG & SON, LD. *v.* BURGESS **C. A. 115**

5. —— *Lease — Licence to substitute new shop front—Covenant to reinstate at expiration or earlier determination of lease—Breach of that covenant—No evidence of damage from breach—Measure of damages—Not the cost of reinstatement but the actual, it might be, merely nominal, damage — Landlord and Tenant Act*, 1927 (17 & 18 *Geo.* 5, *c.* 36), *s.* 19, *sub-s.* 2.
JAMES *v.* HUTTON AND J. COOK & SONS, LD. SAME *v.* SAME - - **C. A. 9**

6. —— *Notice to quit — Subsequent acceptance of rent—No operation as waiver of notice.*
CLARKE *v.* GRANT - - **C. A. 104**

7. —— *Rent restriction — Construction — New Control dwelling-house—Fully furnished flat let at inclusive rent covering some attendance—Action under s.* 9, *sub-s.* 1, *of the Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *as amended, by tenant to recover profit in rent in excess of* (1939) *normal profit—"Any dwelling-house "to which this Act applies."*
LEDERER *v.* PARKER - **C. A. 90**

8. —— *Rent restriction — Death of tenant intestate leaving six children — One of them, a daughter, living with deceased, continues in possession and takes out letters of administration—Notice to quit then served on daughters—Daughter, a contractual tenant by virtue of s.* 12, *sub-s.* 1 (*f*), *of the Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17)—*On expiration of notice to quit becomes a statutory tenant.*
HARRISON *v.* HOPKINS - **C. A. 124**

9. —— *Rent restriction — Dwelling-house —Lease—Property of Great Western Ry. Co. —Nationalization of the railways—British Transport Commission—Not a servant or agent of the Crown—House subject to the Rent Restriction Acts.*
TAMLIN *v.* HANNAFORD - **C. A. 18**

10. —— *Rent restriction — Dwelling house let at inclusive rent—Landlord transfers liability for rates to tenant—"Corresponding "reduction" in rent—Method of calculation—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17) *Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 3.
WOODSIDE HOUSE (WIMBLEDON), LD. *v.* HUTCHINSON - - - **C. A. 182**

11. —— *Rent restriction — Furnished tenancy — Furniture bought by tenant from freeholder during currency of tenancy — Whether character of tenancy changed—Purchase of house by plaintiff—Purported sale to him of furniture by freeholder — Estoppel — Landlord's claim alleging furnished tenancy—Tenant's reliance on Rent Restriction Acts—Jurisdiction of county court.*
WELCH *v.* NAGY - - **C. A. 455**

12. —— *Rent restriction — House damaged by enemy action and rendered uninhabitable—Continued occupation by tenant for business purposes—Contractual tenancy determined—Claim to statutory tenancy.*
MORLEYS (BIRMINGHAM), LD. *v.* SLATER **C. A. 506**

13. —— *Rent restriction — Husband statutory tenant of matrimonial home — Desertion — Wife remaining in occupation — Separate actions by landlord against husband and wife for possession—Purported abandonment of husband of right to possession—Position of wife.*
MIDDLETON *v.* BALDOCK (T. W.). SAME *v.* BALDOCK (G. B.) - - **C. A. 657**

14. —— *Rent restriction — Increases of rent of controlled dwelling-house without notice to quit or statutory notices of increase—Death of tenant—Widow sued for possession and for use and occupation at increased rent—Widows'*

LANDLORD AND TENANT—*continued.*

claim to be "tenant" dependent on whether husband a statutory tenant at time of his death—Landlord's claim in one action to two forms of relief based on inconsistent premises—Landlord prevented from taking advantage of own wrong—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*).
BAXTER *v.* ECKERSLEY - **C. A. 480**

15. —— *Rent restriction — Possession — Surrender — Husband statutory tenant — Departure from flat leaving furniture—Wife's continued occupation notwithstanding husband's revocation of authority to her to occupy—Husband and wife sued for recovery of possession—Husband's return to wife and flat—Possession of flat not given up by husband—Rent Restriction Acts applicable.*
OLD GATE ESTATES, LD. *v.* ALEXANDER **C. A. 311**

16. —— *Rent restriction — Premises shared with landlord—Notice to quit—Summons for possession—Statute preserving tenant's position — Retrospective effect — "Anything "done" before coming into force of Act—Meaning—Landlord and Tenant (Rent Control) Act,* 1949 (12 & 13 *Geo.* 6, *c.* 40), *ss.* 9 *and* 10.
HUTCHINSON *v.* JAUNCEY **C. A. 574**

17. —— *Rent restriction — Premium payable for grant of a lease—Oral agreement between landlord company's managing director and proposed tenant for payment of premium on a tenancy of fourteen years from a future date—Company writes after that date confirming that agreement—Lease executed subsequently providing for this payment—Habendum—"To hold unto the tenant" from the earlier date—"Grant, renewal or continuance "for a term of fourteen years or upwards of "any tenancy"—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 8, *sub-ss.* 1 *and* 3—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3 *and sch.* 1.
COLTON *v.* BECOLLDA PROPERTY INVESTMENTS, LD. - - - - **C. A. 216**

18. —— *Rent restriction — Property first let in* 1947—*Payment to landlord of excessive price for furniture—Right of purchaser to repayment—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 8—*Rent and Mortgage Interest Restrictions Act,* 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 9, *sub-s.* 1.
MINNS *v.* MOORE - - **C. A. 241**

19. —— *Rent restriction — Recovery of possession of house without offer of alternative accommodation — Occupation by statutory tenant—Purchase by landlord's wife after material date—Lease by wife to landlord subject to statutory tenancy—Landlord's claim to possession for own use—Whether tainted with wife's disability as purchaser after material date—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*f*)—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 & 24 *Geo.* 5, *c.* 32), *sch.* 1 (*h*).
LUCAS *v.* LINEHAM - - **C. A. 548**

20. —— *Rent restriction — Recovery of possession of house without offer of alternative accommodation—Purchase of dwelling-house occupied by statutory tenant in* 1944—*Purchasing landlord sues in* 1948 *for possession on ground requires house as residence for himself—Defendant, tenant by virtue of s.* 12, *sub-s.* 1 (*g*), *of Act of* 1920—*Landlord dies whilst case part heard—Action continued by widow as administratrix and in her own right—Widow in no better position than her husband—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 & 24 *Geo.* 5, *c.* 32), *ss.* 3, 13, *and sch.* 1 (*h*).
LITTLECHILD *v.* HOLT - **C. A. 1**

21. ——*Rent restriction — Standard rent—Common mistake — Estoppel — Rescission — Common mistake as to basis of standard rent*
SOLLE *v.* BUTCHER - - **C. A. 674**

22. —— *Rent restriction—Standard rent—Premises altered—Intervening business user—Apportionment—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1929 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*a*) (*as amended by Rent and Mortgage Interest Restrictions Act,* 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 1; *sch.* 1), *s.* 12, *sub-s.* 3.
MITCHELL *v.* BARNES. SAME *v.* ALLEN **C. A. 448**

23. —— *Rent restriction — "Suitable alter-"native accommodation" — "Needs of the "tenant and his family" — Whether tenant's married sons and their wives members of her family—Position of lodger—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3.
STANDINGFORD *v.* PROBERT **C. A. 377**

24. —— *Rural workers — Grant made—by local authority to improve dwelling-house — "Normal agricultural" rent — Rent determined by local authority—Rent not liable to subsequent increase—Housing (Rural Workers) Act,* 1926 (16 & 17 *Geo.* 5, *c.* 56), *s.* 3—*Housing (Rural Workers) Amendment Act,* 1938 (1 & 2 *Geo.* 6, *c.* 35), *s.* 4.
Rent restriction—Application of rent control to dwellings within Housing (Rural Workers) Act, 1926—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 2 (*c*).
BLACKMILL, LD. *v.* STRAKER **C. A. 346**

LANDLORD AND TENANT—*continued.*

25. —— *Standard rent — Dwelling-house let at progressive rent—Rent payable on September* 1, 1939, *less than two-thirds of rateable value—Maximum rent in excess of rateable value—Whether Rent Restriction Acts apply—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1 (*a*) *and* 7—*Rent and Mortgage Interest (Restrictions) Act,* 1939 (2 & 3 *Geo.* 6, *c.* 71), *sch.* 1.
WOOZLEY *v.* WOODALL SMITH **C. A. 325**

26. —— *Trade or business premises—Claim for new lease—Report made by referee—Requirements that report shall be in writing and filed in court office—Oral discussion on report (before judgment and in absence of parties) by county court judge with referee — Irregularity — Judgment set aside—County Court Rules,* 1936, *Or.* 10, *r.* 2 (*g*), *Or.* 40 (*Landlord and Tenant Act,* 1927), *r.* 5—*Landlord and Tenant Act,* 1927 (17 & 18 *Geo.* 5, *c.* 36), *ss.* 4, 5 *and* 21—*County Courts Act,* 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 90.
SCHOOLEY *v.* NYE - - **C. A. 335**

LICENSOR AND LICENSEE. *See* NEGLIGENCE.

LIMITATION — *Theft of motor car—Action against innocent purchaser—Identity of thief not known—When cause of action accrued—Limitation Act,* 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 2, *sub-s.* 1; *s.* 3, *sub-s.* 1; *s.* 26.
R. B. POLICIES AT LLOYDS *v.* BUTLER **Streatfeild J. 76**

2. —— *See* LAND DRAINAGE.

LOCAL GOVERNMENT — *Public health — Movable dwellings—Licence to use land as camping ground—User detrimental to amenities of district—Refusal of licence on that ground — Validity — Public Health Act* 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 49), *s.* 269.
PILLING *v.* ABERGELE URBAN DISTRICT COUNCIL - - - **Divl. Ct. 636**

2. —— *Water rate — Rural district council —Four parishes in area of supply originally receiving water free—Alleged enforceable equity to demand reduced rate—Public Health Act,* 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 49), *s.* 126—*Rural Water Supplies and Sewerage Act,* 1944 (7 & 8 *Geo.* 6, *c.* 26), *s.* 6—*Water Act,* 1945 (8 & 9 *Geo.* 6, *c.* 42), *s.* 40.
BORDER RURAL DISTRICT COUNCIL *v.* ROBERTS - - - - **C. A. 716**

MANDAMUS. *See* CROWN PRACTICE.

MASTER AND SERVANT — *Accident to servant—Safe system of work—Risk of greater injury—Servant with only one good eye—Other eye injured—Master's obligation.*
PARIS *v.* STEPNEY BOROUGH COUNCIL **C. A. 320**

MINES — *Breach of statutory duty by shot-firer—Mine-worker injured by explosive—Liability of mine-owner or manager—Coal Mines Act,* 1911 (1 & 2 *Geo.* 5, *c.* 50), *s.* 86—*General Regulations,* 1913, *made under the Coal Mines Act,* 1911 (*St. R. & O.* 1913, *No.* 748), *reg.* 1—*Explosives in Coal Mines Order,* 1934, *made under s.* 61 *of the Act of* 1911 (*St. R. & O.* 1934, *No.* 6), *arts.* 2 (*e*) *and* 6 (*a*).
HARRISON *v.* NATIONAL COAL BOARD **C. A. 466**

MISTAKE. *See* LANDLORD AND TENANT.

MOTOR VEHICLE. *See* ROAD TRAFFIC.

NATIONAL INSURANCE. *See* WORKMEN'S COMPENSATION.

NEGLIGENCE — *Licensor and licensee — Child playing on local authority's waste land—Fall down bank on to broken glass—Injury—Allurement — Concealed danger — Trap — Liability of licensor.*
WILLIAMS *v.* CARDIFF CORPORATION **C. A. 514**

2. —— *Personal injuries — Invitor and invitee — Duty of invitor — Damage from "unusual danger" — Meaning of — Ship repairer occupying ship responsible for inadequate staging — Liability to injured employee of sub-contractor.*
HORTON *v.* LONDON GRAVING DOCK CO., LD. - - - - - **C. A. 421**

2. —— *See* PERSONAL INJURIES.

NUISANCE. *See* PERSONAL INJURIES.

PERSONAL INJURIES — *Cricket club ground—Ball hit into highway—Pedestrian on highway struck and injured—Public nuisance—Negligence.*
STONE *v.* BOLTON - - **C. A. 201**

2. —— *See* NEGLIGENCE.

PRACTICE. *See* EVIDENCE.

PRINCIPAL AND AGENT — *Commission — Sale of bungalow—Estate agents' commission—If they introduce to principal a person able, ready and willing to purchase the property on terms specified—Person so introduced by agent—Offer refused, because of an arrangement made with another would-be purchaser, not binding in law, but morally and as a matter of business—Agent's commission payable.*
E. P. NELSON & CO. *v.* ROLFE **C. A. 139**

2. *See* GAMING.

PROCEDURE — *Appeal — Abandonment — Request to have appeal dismissed initialled by president of the court—No order drawn up or*

PROCEDURE—*continued.*

entered—Fresh notice of appeal given—Practice direction, 1938 (*Note to Or.* 58, *r.* 8, *Annual Practice,* 1948 *p.* 1330).

Bill of exchange — Action on — Defence and counterclaim for unliquidated damages for breach of contract—Procedure under Or. 14—*Liberty to sign immediate judgment for amount of bill and interest.*
James Lamont & Co., Ld. *v.* Hyland, Ld. - - - - - **C. A. 585**

2. —— *Contract — Service of writ out of jurisdiction—Claim for an account—R. S. C.,* 1883, *Or.* 11, *r.* 1 (*e*).
International Corporation, Ld. *v.* Besser Manufacturing Co. **C. A. 488**

3. —— Criminal. *See* Criminal Law.

PUBLIC HEALTH. *See* Local Government.

RAILWAYS — *Level crossing Accommodation crossing—Duty to shut gates—Railways Clauses Consolidation Act,* 1945 (8 & 9 *Vict., c.* 20), *ss.* 47, 68 *and* 75.

Copps *v.* Payne - **Divl. Ct. 611**

RATING — *Private zoo — Valuation — Profits basis—No comparable hereditament—Consideration of profits — Deductions — Interest on capital—Profits earned off hereditament—Profits tax.*
Surrey County Valuation Committee *v.* Chessington Zoo, Ld. **Divl. Ct. 640**

2. —— *Provisional Valuation list — Railway hereditament — Local Government Act,* 1948 (11 & 12 *Geo.* 6, *c.* 26), *ss.* 85, *sub-s.* 1 *and* 89, *sub-s.* 5 (*b*).
The King *v.* St. Pancras Borough Assessment Committee. *Ex parte* The Railway Executive - - **C. A. 58**

REQUISITIONING. *See* Emergency Legislation.

REVENUE — *Stamp duty — Exemption — Amalgamation of companies — Exemption conditional on transferee's retention "of the "shares" for two years — Construction — Whether exemption lost by sale of part of shares —Finance Act,* 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 55, *sub-s.* 6 (*b*).
Attorney-General *v.* London Stadiums, Ld. - - - **Lord Goddard C.J. 72**

2. —— *Stamp duty — Exemption — Amalgamation of companies—Shares issued by transferee company to existing companies—Exemption dependent on retention of "the "shares so issued"—Sale of some of the shares —Effect on exemption—Finance Act,* 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 55, *sub-s.* 6 (*b*).
Attorney-General *v.* London Stadiums, Ld. - - - - - **C. A. 387**

RIGHTS OF WAY—*Use for upwards of twenty years—Gate across way locked from time to time by tenant—Enjoyment of way "without interruption" — Meaning — Relevance of interruptor's intention—Rights of Way Act,* 1932 (22 & 23 *Geo.* 5, *c.* 45), *s.* 1, *sub-s.* 1.
Lewis *v.* Thomas - - **C. A. 438**

ROAD TRAFFIC — *Goods Vehicles — Keeping of records — Exemption where "vehicle" used in the business of agriculture—Conveyance by farmer of vegetables for sale by retail—Goods Vehicles (Keeping of Records) Regulations,* 1935 (*St. R. & O.,* 1935, *No.* 314) *reg.* 6.
Manley *v.* Dabson. Manley *v.* Same **Divl. Ct. 100**

2. —— *Motor vehicles — Classification — Heavy motor car or light locomotive—Vehicles not "constructed" themselves to carry any load—Meaning—Road Traffic Act,* 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 2, *sub-ss.* 1 (*b*) *and* (*d*), 4 (*b*), *s.* 18, *sub-ss.* 1 *and* 3.
Keeble *v.* Miller - **Divl. Ct. 601**

SHIPPING — *Charterparty — Construction — Vessel to go "to one or two safe ports East "Canada . . . . place or places as ordered by "charterers"—Whether vessel an arrived ship on reaching port or berth—Meaning of "place "or places."*
Stag Line, Ld. *v.* Board of Trade **Devlin J. 536**

SOLICITOR — *Debt collector not legally qualified—Authorization by principal to take proceedings in court—Payment solely by commission on sum collected or recovered—Preparation of particulars of claim—Instrument prepared "in expectation of any fee, "gain or reward"—Offence—Solicitors Act,* 1932 (22 & 23 *Geo.* 5, *c.* 37), *s.* 47, *sub-s.* 1 —*Solicitors Act,* 1941 (4 & 5 *Geo.* 6, *c.* 46), *sch.* III.
Pacey *v.* Atkinson - **Divl. Ct. 539**

STATUTORY DUTY — Breach of. *See* Mines.

WATER. *See* Local Government.

WORKMEN'S COMPENSATION — *National Insurance (Industrial Injuries)—Repeal of Workmen's Compensation Acts—Transitional provisions — Industrial disease — Dermatitis produced by dust or liquids—Workman's claim to both injury benefit and compensation—Validity—Workmen's Compensation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 84), *ss.* 1, 9, 43 *and sch.* III —*National Insurance (Industrial Injuries) Act,* 1946 (9 & 10 *Geo.* 6, *c.* 62), *ss.* 1, 55 *and* 89, *sub-s.* 1, *proviso* (*a*).
Hales *v.* Bolton Leathers, Ld. **C. A. 493**

ADDENDUM TO INDEX

INSURANCE (MARINE) — *Constructive total loss — Ship damaged — Unlikelihood of obtaining licence to repair—Marine Insurance Act*, 1906, *s*. 60—*Whether common law superseded—Partial loss—Valued policy—Measure of indemnity — Depreciation — Computation —Marine Insurance Act*, 1906 (6 *Edw*. 7, *c*. 41), *s*. 60 ; *s*. 69, *sub-s*. 3.
IRVIN *v*. HINE - - - **Devlin J. 555**

INTERNATIONAL LAW — *Polish Government — Former Polish Government resident in London — Recognition by British Government of new Polish Government from midnight on certain date — New Polish Government established in Poland before time of recognition — Agreement between minister of former Polish Government and employees of owners of Polish ships— Agreement made before moment of recognition of new Polish Government but after its establishment in Poland—Question of retroactivity of time of recognition to date of "de facto" establishment of new Polish Government—Whether agreement by minister of former Polish Government void on ground of retroactivity of time of recognition.*
BOGUSLAWSKI *v*. GDYNIA-AMERYKA LINIE **Finnemore J. 157**

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